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(1)

No.

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

RICHARD RIVENBURGH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, railroad employees may recover for workplace injury or death "resulting in whole or in part from the negligence" of the railroad. *Id.* § 51. This case presents two related questions on which the lower courts are deeply divided:

1. Whether there is a relaxed standard of causation under FELA.

2. Whether there is a relaxed standard of negligence under FELA.

RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CSX Transportation, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-9a) is unreported but is available at 2008 WL 2229018. The decision and order of the district court denying petitioner's motion for judgment as a matter of law or, in the alternative, for a new trial (App., *infra*, 10a-27a) is unreported but is available at 2006 WL 2571018.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, are reproduced in the Appendix. App., *infra*, 28a-32a.

INTRODUCTION

Under the Federal Employers' Liability Act (FELA or Act), railroad employees may recover for workplace injury or death "resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. In *Norfolk Southern Railway Co.* v. *Sorrell*, 127 S. Ct. 799 (2007), this Court addressed the question whether the causation standard for a defendant's negligence under FELA is the same as that for a plaintiff's contributory negligence. The Court applied the principle that "the elements of a

FELA claim are determined by reference to the common law" unless the Act contains "express language to the contrary," *id.* at 805, and it held, consistent with the common law, that the causation standard is the same for both parties, *id.* at 805-809. The petitioner in *Sorrell* had also asked the Court to decide what the standard of causation is, and to hold that both the plaintiff and the defendant are required to establish proximate causation. The Court declined to address that question, however, because it had not granted certiorari to do so. *Id.* at 803-805.

Two separate concurring opinions in *Sorrell* did address the standard of causation. In a concurrence joined by Justices Scalia and Alito, Justice Souter noted that there was a conflict among lower courts on whether FELA requires a showing of proximate causation or some lesser showing. 127 S. Ct. at 809 & n.*. Justice Souter's concurrence went on to explain that proximate causation was the common-law rule before FELA; that FELA did not abrogate it; and that, contrary to the view of some lower courts, this Court's decision in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), did not adopt a different rule. 127 S. Ct. at 809-812. In a separate opinion concurring in the judgment, Justice Ginsburg, writing only for herself, took the position that there is a relaxed standard of causation under FELA. *Id.* at 812-815.

As the various opinions in *Sorrell* make clear, the question whether the standard of causation under FELA is proximate causation or some less stringent standard is ripe for definitive resolution by this Court. Unlike *Sorrell*, this case squarely presents that question. It also presents the closely related question whether there is a relaxed standard of neg-

ligence under the Act. The Second Circuit held below that FELA "creat[es] a relaxed standard for negligence as well as causation" and that, "[m]easured by these standards," the jury's verdict in respondent's favor was supported by sufficient evidence. App., *infra*, 3a.

This Court should grant certiorari on both questions. *First*, federal courts of appeals and state courts of last resort are deeply divided both on the causation question (as Justice Souter observed in *Sorrell*) and on the negligence question (as the Second Circuit itself acknowledged in a prior case). *Second*, the "relaxed" standards adopted by the Second Circuit cannot be reconciled with the interpretive methodology consistently employed by this Court (including in *Sorrell*)—that FELA incorporates common-law principles unless it expressly provides otherwise—and the Second Circuit's standards are therefore erroneous. *Third*, the standards of causation and negligence have recurring importance, because those elements are potentially at issue in every FELA case, at every stage of the litigation, as well as in every case brought under the Jones Act, which incorporates the judicially developed principles of liability under FELA.

Virtually every day, in federal and state courts across the Nation, similarly situated parties in cases governed by the same federal statute—FELA—are subjected to different rules on two elements of the claims at issue solely because of the happenstance of where the suit was filed. That is an intolerable state of affairs, all the more so because one of the very purposes of FELA was to "create uniformity throughout the Union." *Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386,

60th Cong., 1st Sess. 3 (1908)). The Court should not allow it to persist.

STATEMENT

A. Statutory Background

Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Norfolk S. Ry. Co.* v. *Sorrell*, 127 S. Ct. 799, 805 (2007). State-law remedies are preempted. *Ibid.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove negligence. Section 1 of FELA provides that:

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * , or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51. FELA adopts a regime of comparative negligence. Under Section 3 of the Act, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Id.* § 53.

B. Factual Background

Respondent worked as a car inspector at petitioner's railroad yard in Selkirk, New York. According to respondent's trial testimony, the following occurred while he was repairing boxcars in the yard on October 12, 2000: Respondent needed an acetylene torch to perform a repair. After inspecting the torch and observing nothing unusual, he turned on the oxygen tank and struck the igniter. The torch made a loud noise. Respondent examined the torch again and noticed that slag—a byproduct of melting metal—was embedded on the tip of the torch. Respondent later claimed that the noise caused hearing loss in his right ear. App., *infra*, 11a-13a; Pet. C.A. App. 919-928.

C. Proceedings in the District Court

Respondent sued petitioner under FELA, alleging that his hearing loss was the result of petitioner's negligence. A jury found that petitioner was negligent and that its negligence was a cause of respondent's injury. It also found that respondent was contributorily negligent and that his negligence was 40 percent responsible for the injury. The jury awarded $600,000 for past pain and suffering and $400,000 for future pain and suffering, for a total damages award of $1,000,000. The award was reduced to $600,000, to account for respondent's comparative negligence, and was further reduced to $553,150, the present value of that amount. Pet. C.A. App. 1-3; Pet. C.A. Exh. App. 194-196; App., *infra*, 8a n.6.

Petitioner filed a motion for judgment as a matter of law or, in the alternative, for a new trial, challenging, among other things, the sufficiency of the evidence supporting the jury's finding of liability.

The district court denied the motion. App., *infra*, 10a-27a. The court explained that "[t]he Second Circuit construes [FELA], 'in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation.'" *Id.* at 16a (quoting *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999)). Applying that "relaxed" standard, the court ruled that "the evidence was sufficient to support the jury's conclusion that CSX was liable for Rivenburgh's injury." *Id.* at 18a-19a.

D. The Court of Appeals' Decision

Petitioner appealed. The court of appeals affirmed the liability component of the district court's judgment but vacated the damages component. App., *infra*, 1a-9a.

1. As to liability, the court of appeals rejected all of petitioner's arguments, including, as relevant here, that there was insufficient evidence to support the jury's findings of negligence and causation. App., *infra*, 2a-4a. Petitioner argued that there was insufficient evidence of foreseeability, and therefore of negligence, because respondent (1) offered no evidence that the slag he observed on the torch *after* he heard the noise had been there for any appreciable time (if at all) *before* he heard it; (2) offered no evidence that there had been any prior instance in which a torch operated by an employee of petitioner made a loud noise; and (3) offered no evidence that there had been any prior instance in which an employee of petitioner sustained hearing loss from the use of a torch. Pet. C.A. Br. 33-40. Petitioner argued that there was insufficient evidence of causation because the jury could only speculate that there was slag on the tip of the torch before respondent heard the loud noise. *Id.* at 21, 25, 30-33.

In rejecting these arguments, the court of appeals relied on the same principle on which the district court had relied: that FELA "creat[es] a relaxed standard for negligence as well as causation." App., *infra*, 3a (quoting *Williams*, 196 F.3d at 406). The court of appeals held that, "[m]easured by these standards," the jury's verdict in favor of respondent was supported by sufficient evidence. *Ibid.*

The court found sufficient evidence of negligence because petitioner "trained its employees to inspect and clean acetylene torches prior to using them" and respondent testified that his supervisors "were pressuring him to expedite his work." App., *infra*, 4a (quoting district court's decision). The court found sufficient evidence of causation because respondent and a co-worker testified about "the dangers of the acetylene torches and the possible consequence of failing to clean and inspect them" and respondent testified that "he saw slag on the tip of the torch after hearing the loud noise." *Id.* at 3a-4a (quoting district court's decision).

2. As to damages, the court of appeals found that the jury's award was excessive. The court concluded that a reasonable award could not exceed $400,000 (consisting of $240,000 for past pain and suffering and $160,000 for future pain and suffering) and then reduced that amount by 40 percent—to $240,000—to account for respondent's comparative negligence. The court remanded for a new trial on damages, while giving respondent the option of forgoing trial if he agreed to remit any damages above $240,000. The court of appeals directed respondent to inform the district court of his intent to remit or retry, and it directed the parties, in the event respondent de-

cided to remit, to agree on an appropriate reduction to present value. App., *infra*, 5a-9a.

Respondent has since informed the district court that (1) he has decided to remit and (2) the parties have agreed on a 2% reduction to present value. Resp. Am. Notice of Intent to Remit 1. As a consequence, the total adjusted damages award is $221,832. *Id.* at 2. As a further consequence, there will be no retrial on damages and the only remaining issue is whether the jury permissibly found in respondent's favor on liability.

REASONS FOR GRANTING THE PETITION

This case presents the question left open in *Norfolk S. Ry. Co.* v. *Sorrell*, 127 S. Ct. 799 (2007), and addressed in two concurring opinions in that case: whether, in an action under FELA, a plaintiff must prove that the defendant's negligence was the proximate cause of the injury, or instead, as the court of appeals held here, need satisfy only a "relaxed" standard of causation. This case also presents the closely related question whether there is a relaxed standard of negligence under the Act. The lower courts are deeply divided on both questions; the court below has resolved both questions incorrectly, in disregard of the settled interpretive principle that FELA incorporates common-law rules unless it expressly provides otherwise; and both questions have recurring importance, because they arise in every FELA (and every Jones Act) case. This Court should grant certiorari to establish uniform standards for the two basic elements of a FELA claim.

A. The Decision Below Conflicts With Decisions Of Other Federal Courts Of Appeals And State Courts Of Last Resort

The basic elements of a FELA cause of action are "(1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury." *Norfolk S. Ry.* v. *Sorrell*, 127 S. Ct. 799, 807 (2007) (quoting *Page* v. *St. Louis Sw Ry. Co.*, 349 F.2d 820, 823 (5th Cir. 1965)).[1] The court below held that FELA "creat[es] a relaxed standard for negligence as well as causation" and that, "[m]easured by these standards," the jury's verdict in favor of respondent was supported by sufficient evidence. App., *infra*, 3a. For the proposition that there is a "relaxed" standard for both elements, the court of appeals relied on its prior decision in *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999), which in turn relied on *Ulfik* v. *Metro-North Commuter R.R.*, 77 F.3d 54, 58 n.1 (2d Cir. 1996). App., *infra*, 3a. *Williams* and *Ulfik* stand in a long line of published decisions in which the Second Circuit has held that FELA embodies a relaxed standard of causation, negligence, or both.[2]

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[1] A FELA plaintiff need not prove negligence, and need only prove causation, when the defendant is shown to have violated certain safety statutes (*e.g.*, the Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306). *Norfolk & W. Ry. Co.* v. *Hiles*, 516 U.S. 400, 409 (1996).

[2] See also *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006) (causation and negligence standards are "lighter"); *Wills* v. *Amerada Hess Corp.*, 379 F.3d 32, 47 (2d Cir. 2004) (causation standard is "relaxed"); *Higgins* v. *Metro-North R.R. Co.*, 318 F.3d 422, 426-427 (2d Cir. 2003) (negligence standard is "relaxed"); *Marchica* v. *Long Island R.R. Co.*, 31 F.3d 1197, 1207 (2d Cir. 1994) (causation standard is "less strin-

What does it mean to say that the standards of causation and negligence in FELA cases are "relaxed"? The Second Circuit has answered that question in prior cases. As to causation, the court has said that, "to impose liability on the defendant, the negligence need not be the proximate cause of the injury," *Nicholson* v. *Erie R.R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958), and that "the traditional [common-law] concept of proximate cause [has been] supplanted," *Marchica* v. *Long Island R.R. Co.*, 31 F.3d 1197, 1207 (2d Cir. 1994). As to negligence, the court has said that the employer "is potentially responsible for risks that would be too remote to support liability under common law," *Syverson* v. *Consol. Rail* Corp., 19 F.3d 824, 826 (2d Cir. 1994); accord *Ulfik*, 77 F.3d at 58; *Williams*, 196 F.3d at 407; *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006), and that, although negligence under FELA is governed by the principle of foreseeability, which "determine[s] whether or not a defendant is required to guard against a particular risk," foreseeability is "construed somewhat more liberally in FELA cases," *Ulfik*, 77 F.3d at 58 n.1.

Under the Second Circuit's "relaxed" standards of negligence and causation, therefore, a FELA defendant's duty of care extends to risks more remote than those reached by the common law, and a FELA defendant that breaches its duty of care is liable even when the breach is not the direct cause of the plaintiff's injury. As explained below, those "relaxed"

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gent"); *Syverson* v. *Consol. Rail* Corp., 19 F.3d 824, 825-826 (2d Cir. 1994) (causation standard is "substantially diluted" and negligence standard is "relaxed"); *Nicholson* v. *Erie R.R. Co.*, 253 F.2d 939, 941 (2d Cir. 1958) (causation standard is "modest").

standards have been adopted by several lower courts in addition to the Second Circuit, but they have been squarely rejected by many others, which apply ordinary common-law principles of negligence and causation.

1. The lower courts are divided on whether there is a relaxed standard of causation under FELA

As Justice Souter noted in his *Sorrell* concurrence, a number of federal courts of appeals and state courts of last resort "have taken * * * proximate cause out of the concept of defendant liability under FELA." 127 S. Ct. at 809 n.*; see also *id.* at 804 (opinion of the Court). In addition to the Second Circuit, the Fifth, Sixth, Ninth, and Tenth Circuits, and the Supreme Courts of Alabama, Florida, and Texas, have determined that proximate causation is not required.[3] At the same time, as Justice Souter also

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[3] See *Page* v. *St. Louis Sw Ry. Co.*, 312 F.2d 84, 89 (5th Cir. 1963) (there has been "[a] definite departure from traditional common-law tests of proximate causation as applied to [FELA]"); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006) (plaintiff "need not establish proximate causation"); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993) ("'proximate cause' is not required to establish causation under the FELA"); *Summers* v. *Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) ("analyz[ing] liability under the FELA in terms of proximate causation" has been "definitively abandoned"); *Glass v. Birmingham S. R.R. Co.*, 905 So.2d 789, 796 (Ala. 2004) ("Eschewing a traditional proximate-cause analysis, the FELA embraces an extremely broad standard of causation."); *McCalley* v. *Seaboard Coast Line R.R. Co.*, 265 So.2d 11, 15 (Fla. 1972) ("the concept of proximate cause no longer has any place in an action under [FELA for a violation of] the Federal Safety Appliance Act"); *Dutton* v. *S. Pac. Transp.*, 576 S.W.2d 782, 785 (Tex. 1978) ("common law 'proxi-

noted, "several State Supreme Courts have explicitly or implicitly espoused the opposite view." *Id.* at 809 n.*; see also *id.* at 804 (opinion of the Court). The Supreme Courts of Iowa, Minnesota, Montana, Nebraska, and Ohio, and the Supreme Court of Appeals of West Virginia, have all determined that proximate causation *is* required.[4]

Federal district courts in other circuits and intermediate state appellate courts in other States are likewise divided on the question.[5] Indeed, as the

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mate cause' is not a proper test of the evidence in F.E.L.A. cases").

[4] See *Snipes* v. *Chicago, Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992) ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident."); *Brabeck* v. *Chicago & Nw Ry. Co.*, 117 N.W.2d 921, 923 (Minn. 1962) ("violation of an operating rule may impose liability on an employer if it is the proximate cause of the accident"); *Marazzato* v. *Burlington N. R.R. Co.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff [in a FELA case] has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("To recover under the [FELA], an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury."); *Reed* v. *Pennsylvania Rd. Co.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961) ("In order to support recovery [under FELA] for an injury claimed to have been caused by a violation of the Federal Safety Appliance Act, such violation must amount to *a* proximate cause of such injury, although it need not be *the* proximate cause thereof."); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury.").

[5] Compare, *e.g.*, *Grothusen* v. *Nat'l R.R. Passenger Corp.*, 603 F. Supp. 486, 488 n.4 (E.D. Pa. 1984) (proximate cause not re-

concurrences in *Sorrell* demonstrate, disagreement about the standard of causation extends to members of this Court. Compare 127 S. Ct. at 809-812 (Souter, J., joined by Scalia and Alito, JJ., concurring), with *id.* at 812-815 (Ginsburg, J., concurring in the judgment). So widespread is the conflict that different causation standards are applied in FELA cases, not only *across* States, but also *within* certain States—Ohio and Montana, for example—depending on whether the suit is filed in state or federal court.

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quired); *Zarecki* v. *Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1571 (N.D. Ill. 1996) (Castillo, J.) (same); *Beeber* v. *Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990) (same); *Staley* v. *Iowa Interstate R.R., Ltd.*, No. Civ. 3-99-CV-80169, 2001 WL 1678769 at *2 (S.D. Iowa Aug. 15, 2001) (same); *Magelky* v. *BNSF Ry. Co.*, 491 F. Supp. 2d 882, 887 (D.N.D. 2007) (same); *Hall* v. *Norfolk S. Ry. Co.*, 829 F. Supp. 1571, 1578 (N.D. Ga. 1993) (same); *Fontaine* v. *Nat'l R.R. Passenger Corp.*, 54 Cal. App. 4th 1519, 1525 (1997) (same); *Leveck* v. *Consol. Rail Corp.*, 498 N.E.2d 529, 535 (Ill. App. 1st Dist. 1986) (same); *Albin* v. *Illinois Cent. R.R. Co.*, 660 N.E.2d 994, 999 (Ill. App. 4th Dist. 1995) (same); *Hamilton* v. *CSX Transp.*, 208 S.W.3d 272, 278 (Ky. App. 2006) (same); *Jackson* v. *Kansas City S. Ry.*, 619 So.2d 851, 858 (La. App. 1993) (same); *Boyt* v. *Grand Trunk W. R.R.*, 592 N.W.2d 426, 431 (Mich. App. 1998) (same); *Whitley* v. *S. Pac. Transp. Co.*, 902 P.2d 1196, 1201 (Or. App. 1995) (same), with, *e.g.*, *Lynch* v. *Decker*, No. CIV L-91-1864, 1994 WL 902363 at *3 (D. Md. Aug. 19, 1994) (proximate cause required); *Moore* v. *Chesapeake & Ohio Ry. Co.*, 493 F. Supp. 1252, 1265 (S.D. W. Va. 1980) (same); *Wier* v. *Soo Line R.R. Co.*, No. 96 C 2094, 1997 WL 733909 at *2 (N.D. Ill. Nov. 18, 1997) (Hart, J.) (same); *Dickerson* v. *Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006) (same); *Kelson* v. *Central of Ga. R.R. Co.*, 505 S.E.2d 803, 808 (Ga. App. 1998) (same); *Brooks* v. *Brennan*, 625 N.E.2d 1188, 1193 (Ill. App. 5th Dist. 1994) (same); *Lehman* v. *Nat'l R.R. Passenger Corp.*, 661 A.2d 17, 19 (Pa. Super. 1995) (same).

2. The lower courts are divided on whether there is a relaxed standard of negligence under FELA

There is also disagreement about whether there is a relaxed standard of negligence under FELA. In addition to the Second Circuit, the Third, Fourth, and Ninth Circuits, and the Supreme Court of Washington, have determined that there is.[6] In contrast, the Fifth and Sixth Circuits, and the Louisiana and South Carolina Supreme Courts, have held that there is not.[7] Federal district courts and intermediate state appellate courts are likewise divided on whether FELA's negligence standard is relaxed.[8]

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[6] See *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991) (FELA has "more lenient standard for determining negligence"); *Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510, 512 (4th Cir. 1986) (FELA imposes "light burden of proof on negligence"); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995) ("relaxed standard applies to * * * negligence"); *Seeberger v. Burlington N. R.R. Co.*, 982 P.2d 1149, 1152 (Wash. 1999) ("relaxed standard * * * applies to breach of duty").

[7] See *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc) ("The duty of care owed * * * retains the usual and familiar definition of ordinary prudence."); *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 269 (6th Cir. 2007) ("FELA does not lessen a plaintiff's burden to prove the elements of negligence."); *Vendetto v. Sonat Offshore Drilling Co.*, 725 So. 2d 474, 478 (La. 1999) ("nothing in FELA * * * suggests a variation from the ordinary standard of care used in evaluating negligence in ordinary tort cases"); *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 27-28 (S.C. 2008) ("federal law has not * * * established a relaxed standard of negligence (i.e., duty/breach) in FELA cases").

[8] Compare, *e.g.*, *Pry* v. *Alton & S. Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992) (relaxed standard of negligence); *Briggs* v. *Kansas City S. Ry. Co.*, 925 S.W.2d 908, 913 (Mo. App. 1996) (same); *Robinson* v. *CSX Transp.*, 40 A.D.3d 1384, 1386 (N.Y. App.

The division of authority has been acknowledged by courts on both sides of the conflict, including the Second Circuit itself. See *Williams*, 196 F.3d at 406; *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 26-27 (S.C. 2008).

B. The Decision Below Is Incorrect

Under long-settled precedent of this Court, including its recent decision in *Sorrell*, the elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell*, 127 S. Ct. at 805; *accord, e.g., Norfolk & W. Ry. Co.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543-544 (1994). Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," *Gottshall*, 512 U.S. at 542: the fellow-servant rule; contributory negligence; assumption of risk; and exemption from the Act through contract. 45 U.S.C. §§ 51, 53-55. Otherwise, however, FELA is "founded on common-law concepts." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). Thus, finding no clear contrary indication in the statutory text, the Court has followed the common law in holding that FELA authorizes recovery of certain types of damages for occupational disease, *id.* at 182, negligent infliction of emotional distress, *Gottshall*, 512 U.S. at 549-550, and genuine and serious fear of developing cancer, *Ayers*, 538 U.S. at 149; in holding that FELA provides for joint and several liability, *id.* at 163-165; and in holding that

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2007) (same), with, *e.g.*, *Bavaro* v. *Grand Victoria Casino*, No. 97 C 7921, 2001 WL 289782 at *2 (N.D. Ill. Mar. 15, 2001) (no relaxed standard of negligence); *Phillips* v. *Illinois Cent. R.R. Co.*, 797 So.2d 231, 239 (Miss. App. 2000) (same).

FELA applies the same causation standard to the defendant's negligence and the plaintiff's contributory negligence, *Sorrell*, 127 S. Ct. at 805-809.

FELA likewise incorporates ordinary, not "relaxed," standards of causation and negligence, because there is no language in the statute abrogating the general common-law principles that govern those elements. As explained below, the Second Circuit erred in holding otherwise, thereby upsetting the balance struck by Congress in the Act.

1. The court below erred in holding that there is a relaxed standard of causation under FELA

a. As Justice Souter noted in his *Sorrell* concurrence, "[p]rior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." 127 S. Ct. at 810; *see, e.g.*, 3 John D. Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890); 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898). That remains the common-law rule today. See, *e.g.*, 1 Dan B. Dobbs, *The Law of Torts* § 180, at 443 (2001); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984). The proximate-cause requirement reflects the recognition that, "[i]n a philosophical sense, * * * the causes of an event go back to the dawn of human events, and beyond"; that "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts"; and that a "boundary must [therefore] be set to liability for the consequences of any act." Keeton, *supra*, § 41, at 264.

There is no language in FELA, much less any *express* language, that dispenses with the common-law requirement of proximate causation. On the contrary, "FELA said nothing * * * about the familiar proximate cause standard." 127 S. Ct. at 810 (Souter, J., concurring). Accordingly, under a straightforward application of the established interpretive methodology, proximate causation is an element of a FELA claim.

Consistent with that view, this Court has "recognized and applied proximate cause as the proper standard in FELA suits" virtually from the time of the law's enactment. 127 S. Ct. at 810 (Souter, J., concurring). Indeed, it has done so in more than 15 cases.[9] The Court not only has recognized and ap-

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[9] *See, e.g., Norfolk & W. Ry. Co.* v. *Earnest*, 229 U.S. 114, 118-119 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise * * * reasonable care and caution and * * * his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"); *St. Louis, Iron Mountain & S. Ry. Co.* v. *McWhirter*, 229 U.S. 265, 280 (1913) ("it must be shown that the alleged negligence was the proximate cause of the damage"); *Lang v. New York Cent. R.R. Co.*, 255 U.S. 455, 461 (1921) (jury's verdict must be reversed because "the collision was not the proximate result of the defect"); *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923) ("an employee cannot recover under [FELA for a violation of] the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury"); *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Goneau*, 269 U.S. 406, 410-411 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident * * * , the case was rightly submitted to the jury"); *St. Louis-S.F. Ry. Co.* v. *Mills*, 271 U.S. 344, 347 (1926) ("Nor is there evidence from which the jury might infer that petitioner's [negligence] was the proximate cause of decedent's death."); *New York Cent. R.R. Co.* v. *Ambrose*, 280 U.S. 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due

plied the requirement, but has stated it in the clearest possible terms. "In order to recover under [FELA]," the Court has said, "it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the * * * accident." *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944).

b. In adopting a "relaxed" standard of causation in FELA cases, one less demanding than the com-

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to the negligence of the company"); *Northwestern Pac. R.R. Co.* v. *Bobo*, 290 U.S. 499, 503 (1934) ("If petitioner was negligent * * * , there is nothing whatsoever to show that this was the proximate cause of the unfortunate death."); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 294 U.S. 529, 531 (1935) ("The Safety Appliance Act * * * give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a requirement of the act."); *Tiller* v. *Atl. Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943) (FELA "leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"); *Brady* v. *S. Ry. Co.*, 320 U.S. 476, 483 (1943) ("evidence of the unsuitablity of the rail for ordinary use * * * would justify a finding for [the plaintiffs], if the defective rail was the proximate cause of the derailment"); *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"); *Urie* v. *Thompson*, 337 U.S. 163, 177 (1949) (complaint stated claim under FELA because "[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and injury"); *O'Donnell* v. *Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 390 (1949) ("a failure of equipment to perform as required by the Safety Appliance Act is * * * an actionable wrong, * * * for the proximate results of which there is liability [under FELA]"); *Carter* v. *Atlanta & St. Andrew's Bay Ry. Co.*, 338 U.S. 430, 435 (1949) ("if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff").

mon-law rule of proximate causation, the Second Circuit has relied on this Court's decision in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). See, *e.g.*, *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006); *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999); *Marchica* v. *Long Island R.R. Co.*, 31 F.3d 1197, 1207 (2d Cir. 1994). Indeed, virtually every court that has adopted a relaxed standard of causation has done so in reliance on *Rogers*. See *Sorrell*, 127 S. Ct. at 809 n.* (Souter, J., concurring); note 3, *supra*. As the three-Justice concurrence in *Sorrell* explained, however, "*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm." *Id.* at 809-10 (Souter, J., concurring). Instead, "the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury." *Id.* at 810.

(i) At common law, a plaintiff's contributory negligence "operated as an absolute bar to relief." *Sorrell*, 127 S. Ct. at 805. FELA abolished that defense, replacing it with the doctrine of comparative negligence. *Gottshall*, 512 U.S. at 542. Under the Act, a defendant is liable for the plaintiff's injury or death "resulting in whole *or in part*" from the defendant's negligence, 45 U.S.C. § 51 (emphasis added), and the plaintiff's damages are reduced "in proportion to the amount of negligence attributable to [the defendant]," *id.* § 53.

Rogers concerned those principles. The Court "granted certiorari * * * to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes." *Sorrell*, 127 S. Ct. at 810 (Souter, J., concurring).

Quoting FELA's comparative-negligence provisions, *Rogers*, 352 U.S. at 506 n.12, 507 & n.14, the Court explained that a railroad is liable if its negligence "played any part, even the slightest," in producing the employee's injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence," *id.* at 506. The Court ultimately held that the evidence in the case was sufficient to support a finding that the defendant's negligence "played a part" in the plaintiff's injury. *Id.* at 503.[10]

As Justice Souter observed in *Sorrell*, *Rogers* thus addressed only "the occasional multiplicity of causations." 127 S. Ct. at 811. It did not address "the necessary directness of cognizable causation." *Ibid.* The two concepts are distinct. "[A] given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004).

(ii) Far from having rejected proximate causation, the Court in *Rogers* assumed that proximate cause is an element of a FELA claim. For example, the jury instructions in the case required a determination that the defendant's negligence was the "proximate cause" of the plaintiff's injuries. *Rogers*, 352 U.S. at 505 n.9. That aspect of the instruction was "free of controversy" and one with which the Court "took no issue." *Sorrell*, 127 S. Ct. at 811

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[10] See also *Rogers*, 352 U.S. at 507-508 (issue is whether defendant's negligence "played any part, however small," in plaintiff's injury and jury question is presented if conclusion may reasonably be drawn that defendant's negligence "played any part at all" in plaintiff's injury); *id.* at 508-510 (repeatedly stating that Congress intended juries to decide whether defendant's negligence "played any part" in plaintiff's injury).

(Souter, J., concurring). Indeed, in sustaining the jury's finding of liability, the Court assumed that "the verdict was obedient to the trial judge's charge." *Rogers*, 352 U.S. at 505.

"The absence of any intent to water down the common law requirement of proximate cause is [also] evident from the prior cases on which *Rogers* relied." *Sorrell*, 127 S. Ct. at 811 (Souter, J., concurring). Those cases hold that a FELA plaintiff must establish proximate causation. Thus, for the proposition that the test under FELA is whether the defendant's negligence "played any part, even the slightest," in producing the plaintiff's injury (352 U.S. at 506), the Court cited *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the defendant's negligence was "the sole or a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury (*id.* at 507), the Court cited *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 507 n.13.

The Court's decision in *Rogers* is thus "no authority for anything less than proximate causation in an action under FELA." 127 S. Ct. 812 (Souter, J., concurring). The holding of the case is not that a FELA defendant's negligence need not be the proximate cause of the injury, but that it need not be the *sole* proximate cause. After more than half a century of

pervasive confusion on the point, there is a pressing need for this Court to clarify *Rogers*' meaning.

c. It has been suggested that, whether or not this Court held that FELA plaintiffs need not prove proximate causation in *Rogers*, it so held in two cases decided after *Rogers*. See *Sorrell*, 127 S. Ct. at 812, 813 n.1 (Ginsburg, J., concurring in the judgment) (citing *Crane* v. *Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969), and *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994)). In fact, neither of those decisions held that FELA abrogates the requirement of proximate cause.

In *Crane*, the Court cited *Rogers* for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]." 395 U.S. at 166. That statement is dictum, because the suit against the railroad in *Crane* was filed by a *non*employee, and thus the issue of causation was governed by state law rather than FELA. *Id.* at 167. In any event, the statement is properly read to mean only that FELA does not embody the common-law concept of *sole* proximate causation, as the Court's quotation of the Act's "in whole or in part" language confirms. If the dictum was intended to mean something more, however, it was simply incorrect, because it conflated the question of how direct a cause of an injury must be with the question of how to proceed when the injury has multiple causes. Certainly the dictum in *Crane* cannot be thought to have overruled the long line of decisions explicitly *holding* that proximate causation is required by FELA, see note 9, *supra*, particularly in light of this Court's recent reaffirmation of the principle that, "[a]bsent express language to the con-

trary, the elements of a FELA claim are determined by reference to the common law," *Sorrell*, 127 S. Ct. at 805.

In *Gottshall*, the Court cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA." 512 U.S. at 543. That statement, too, is dictum, because *Gottshall* involved an issue—the standard for negligent infliction of emotional distress—that did not require the Court to express a view on FELA causation generally. In any event, the illustrative language that immediately followed the Court's statement—a quotation from *Rogers* to the effect that the employer's negligence need only have "played any part, even the slightest, in producing the injury or death for which damages are sought," *ibid.* (quoting 352 U.S. at 506)—is entirely consistent with the proper understanding of *Rogers* (*i.e.*, that it is a case about multiple causes). *Gottshall*'s dictum concerning the "relaxed standard of causation"—which does not mention proximate cause—thus appears to be a reference to the fact that, unlike the common law, FELA allows a plaintiff to recover even when the railroad bears only a small proportion of the responsibility for the injury.

2. The court below erred in holding that there is a relaxed standard of negligence under FELA

a. The common-law definition of negligence is a failure to exercise the care necessary under the circumstances to protect others against an unreasonable risk of harm. That was the rule at the time of FELA's enactment, see, *e.g.*, 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 3, at 3 (5th ed. 1898), and it remains the rule today, see, *e.g.*, W. Page Keeton et al., *Prosser &*

Keeton on the Law of Torts § 31, at 169-170 (5th ed. 1984). The common-law concept recognizes that "[n]o person can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded." *Id.* § 31, at 170.

According to the established interpretive methodology, the ordinary common-law standard of negligence applies in FELA cases unless there is "express language to the contrary" in the statute. *Sorrell*, 127 S. Ct. at 805. As the en banc Fifth Circuit has explained, there is "nothing in the text" of FELA—or even in its "structure"—to indicate that "the standard of care * * * is anything different than ordinary prudence under the circumstances." *Gautreaux* v. *Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc). On the contrary, FELA provides simply that a railroad is liable for injuries caused by its "negligence," 45 U.S.C. § 51, and "one must assume that Congress intended its words to mean what they ordinarily are taken to mean—a person is negligent if he or she fails to act as an ordinarily prudent person would act in similar circumstances," *Gautreaux*, 107 F.3d at 338 (quoting *Fashauer* v. *New Jersey Transit Rail Operations*, 57 F.3d 1269, 1283 (3d Cir. 1995)).

Consistent with that view, this Court has explicitly stated that the definition of "negligence" in FELA is determined by "common law principles," *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949)—and, in particular that an employer's liability is determined "under the general rule which defines negligence as the lack of due care under the circumstances," *Tiller* v. *Atl. Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943);

accord *Anderson* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821, 823 (1948) (per curiam). Indeed, in *Sorrell* itself, the Court confirmed that the standard of negligence, for both the railroad and the employee, is "ordinary prudence." 127 S. Ct. at 807 (quoting *Page* v. *St. Louis Sw Ry. Co.*, 349 F.2d 820, 823 (5th Cir. 1965)).

b. The Second Circuit has not suggested that there is any language in FELA—much less any *express* language—that supports that court's departure from the common law. In interpreting FELA to create a "relaxed" standard of negligence, one making railroads potentially responsible for risks too remote to support liability under the common law, the Second Circuit has instead relied on the statute's "broad remedial nature." App., *infra*, 3a (quoting *Williams*, 196 F.3d at 406, in turn quoting *Ulfik* v. *Metro-North Commuter R.R.*, 77 F.3d 54, 58 n.1 (2d Cir. 1996)). That rationale, however, was explicitly rejected in *Sorrell*.

In arguing that FELA creates a less stringent standard of causation for the defendant's negligence than for the plaintiff's contributory negligence, the plaintiff in *Sorrell* likewise invoked FELA's "remedial purpose." 127 S. Ct. at 808. The Court was "not persuaded." *Ibid.* While acknowledging that FELA "was indeed enacted to benefit railroad employees"—"as the express abrogation of [certain] common-law defenses * * * make[s] clear"—the Court explained that it nevertheless "does not follow * * * that this remedial purpose requires [the Court] to interpret every uncertainty in the Act in favor of employees." *Ibid.* The Court went on to say that "FELA's text does not support the proposition that Congress meant to take the unusual step of applying different

causation standards" and that "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Ibid.* The Court therefore held that "FELA does not abrogate the common-law approach." *Ibid.* The Court's reasoning in *Sorrell* is no less dispositive here.

c. The Second Circuit has also suggested that its "relaxed" standard of negligence follows from this Court's statement in *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), that "the theory of FELA is that where the employer's conduct falls short of the high standard required of him by the Act and his fault, in whole or in part, causes injury, liability ensues." *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006) (quoting 355 U.S. at 438-439). *Kernan* cannot justify the Second Circuit's relaxed standard, because, in that case, the Court was not addressing the definition of "negligence" in FELA. On the contrary, the Court was addressing a circumstance in which a defendant can be liable under the Act "without regard to negligence" (*Kernan*, 355 U.S. at 431)—namely, when the defendant has violated a safety statute. See note 1, *supra*.

The Court in *Kernan* did say that the "high standard" of conduct applies "whether the fault is a violation of a statutory duty or the more general duty of acting with care." 355 U.S. at 439. A "high standard" of care may suggest a "relaxed standard" of negligence. But the Court's statement is dictum, because the meaning of "negligence" in FELA was not at issue in the case. The statement is also ill-considered, because it is inconsistent with the established interpretive principle that FELA presumptively incorporates common-law concepts, with the absence of any language in FELA expressly abrogat-

ing the common-law understanding of negligence, and with this Court's prior statements—including in *Sorrell*—that FELA incorporates ordinary rules of negligence. *Tiller*, 318 U.S. at 67.

C. The Questions Presented Are Recurring Ones Of Exceptional Importance

1. Because FELA "pre-empt[s] state tort remedies," *Sorrell*, 127 S. Ct. at 805, it is the exclusive remedy for injuries sustained by railroad employees in the workplace. And the remedy is frequently invoked. According to statistics compiled by the Administrative Office of the U.S. Courts, nearly 4,000 FELA actions were commenced in U.S. District Court alone in the five-year period from 2003 through 2007. *Annual Report of the Director: Judicial Business of the United States Courts*, Table C-2A at 1 (2007), *available at* http://www.uscourts.gov/judbus2007/appendices/CO2ASep07.pdf. That number is merely a fraction of the total number of FELA actions commenced in *all* courts (federal and state). According to statistics compiled by the Association of American Railroads (AAR), approximately 25,000 such suits were filed during the five-year period from 1998 through 2002. Br. of AAR as *Amicus Curiae* in *Jones* v. *CSX Transp., Inc.*, No. 03-16231-A (11th Cir. Jan. 27, 2004). The AAR has informed petitioner that approximately 10,000 additional FELA suits were filed during the two-year period from 2003 through 2004.

Because negligence and causation are the basic elements of a FELA claim, moreover, the questions presented in the petition—whether there are "relaxed" or ordinary common-law standards of negligence and causation—can arise in every case brought under FELA. And they can arise at every phase of the litigation: before trial, at the summary-judgment

stage; during trial, when the defendant moves for judgment as a matter of law; at the end of trial, when the jury is instructed; after trial, when the defendant renews its motion for judgment as a matter of law following a verdict in the plaintiff's favor; and on appeal, when challenges to jury instructions and the sufficiency of the evidence can be raised again.

The questions presented here can also arise in every case brought under the Jones Act, 46 U.S.C. § 30104(a), the law that governs liability for injuries sustained in the workplace by seamen. In actions brought under the Jones Act, courts are obliged to apply the "[l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee." *Ibid.* This Court has held that the Jones Act thus "adopts 'the entire judicially developed doctrine of liability' under [FELA]." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (quoting *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958)). As a consequence, judicial interpretations of FELA's negligence and causation elements apply both in FELA suits by railroad employees and in Jones Act suits by seamen. Compare, *e.g.*, *Wills* v. *Amerada Hess Corp.*, 379 F.3d 32, 47 n.8 (2d Cir. 2004) (relaxed standard of causation under FELA and Jones Act), with, *e.g.*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc) (no relaxed standard of negligence under FELA or Jones Act).

2. The conflicting standards applied by the lower courts do not differ merely in their formulations; they can affect the outcome of cases. In upholding the jury's verdict in this case, for example, the Second Circuit "[m]easured" the sufficiency of the evidence by the "relaxed" standards established in its

prior decisions. App., *infra*, 3a. And it is likely that the verdict would *not* have been upheld if the Second Circuit had applied ordinary common-law principles. The court found the evidence sufficient, in part, because petitioner "trained its employees to inspect and clean acetylene torches prior to using them" and respondent testified that his supervisors "were pressuring him to expedite his work." *Id.* at 4a. Under ordinary (as opposed to "relaxed") principles of foreseeability, however, an employer could not reasonably anticipate that an employee would fail to conduct a thorough (but uncomplicated) inspection he had been trained to conduct for his own safety, *id.* at 11a-12a, 18a; Pet. C.A. Exh. App. 50-51, of equipment "he had thirty years experience using," *id.* at 12a, merely because the employee had been told to "expedite his work," *id.* at 4a, a routine occurrence in virtually any workplace.

Prior decisions of the Second Circuit confirm that the "relaxed" standards allow plaintiffs to prevail in cases in which they would not have prevailed if the suits had been filed in other courts. In *Syverson* v. *Consolidated Rail Corp.*, 19 F.3d 824 (2d Cir. 1994), for example, the employee was "attacked by a knife-wielding stranger" in the employer's railyard. *Id.* at 825. The district court granted summary judgment to the railroad, reasoning that "a sudden violent attack by a crazed trespasser was inherently unforeseeable" and that the railroad therefore "could not be deemed negligent." *Ibid.* The Second Circuit acknowledged that the attack was "essentially freakish," that the evidence of negligence was "slight" and "[t]hin," and that the railroad would have been entitled to summary judgment "had this been a negligence action at common law." *Id.* at 825-828. The Second Circuit nevertheless reversed, relying on the

principle that the standard of negligence under FELA is "substantially diluted" and "relaxed," such that an employer can be "responsible for risks that would be too remote to support liability under common law." *Id.* at 825-826. The court relied, in part, on its prior decision in *Gallose* v. *Long Island R.R. Co.*, 878 F.2d 80, 84-86 (2d Cir. 1989), which held that, under FELA, a railroad's negligence could be established when an employee was bitten by a large dog the employer knew or should have known was on the premises, even though, under the common-law rule, negligence could not be established unless the defendant knew or should have known that the dog on its premises was vicious. *Syverson*, 19 F.3d at 827-828.

In another case, *Zimmerman* v. *Long Island R.R.*, 2 Fed. Appx. 172 (2d Cir. 2001), the employee was directed "to cut down a tree that was fouling a track" and did so "by himself with some difficulty"; his foot then "became entangled in brush near the track," and he "tripped and injured his right knee." *Id.* at 173. A jury returned a verdict in favor of the employee. The Second Circuit affirmed, holding, among other things, that there was sufficient evidence of causation. Applying the principle that "the standard under the FELA is relaxed" and that "the plaintiff is not required to prove common-law proximate causation," the court concluded that a jury "easily" could have found that the employee's injury was caused by the railroad's violation of regulations governing a "lone worker." *Id.* at 175-176 (internal quotation marks omitted). The court reasoned that, if the employee's supervisor "had been aware that the [employee] was not qualified as a lone worker," the employee "would presumably not have been dispatched" on the night of the injury. *Id.* at 176. That

is classic "but for" causation—the violation of the regulations "merely create[d] an incidental condition or situation in which the accident, otherwise caused, result[e]d in [an] injury," *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923)—and it is therefore insufficient under the common law. Indeed, a trial court in Ohio—where proximate causation *is* required—recently granted summary judgment for the railroad in a FELA case with similar facts. See *Sievert* v. *CSX Transp., Inc.*, No. CI0200504624, 2008 WL 3819782 (Ohio Ct. Com. Pl. June 22, 2008) (theory of causation was that injury would not have occurred if locomotive on which plaintiff was injured had been taken out of service because of defective handbrake, which otherwise bore no relation to injury).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008

APPENDIX

APPENDIX A

United States Court of Appeals, Second Circuit.

Richard RIVENBURGH, Plaintiff-Appellant,

v.

CSX TRANSPORTATION, Defendant-Appellee.

Nos. 06-4514-cv(L), 06-4884-cv(Con).

May 30, 2008.

Michael Kleeman, Kleeman & DiGiovanni, P.C., Philadelphia, PA, for Appellant.

Noreen DeWire Grimmick, (Lawrence R. Bailey, Jr., on the brief), Hodgson Russ LLP, Albany, NY, for Appellee.

Present SONIA SOTOMAYOR, DEBRA A. LIVINGSTON, Circuit Judges, LORETTA A. PRESKA, District Judge.[1]

SUMMARY ORDER

UPON DUE CONSIDERATION of this appeal from the September 29, 2006 judgment of the United States District Court for the Northern District of New York (Sharpe, J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment is

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[1] The Honorable Loretta A. Preska, United States District Court for the Southern District of New York, sitting by designation.

AFFIRMED in part, VACATED in part, and remanded to the district court with instructions.

Defendant-Appellant CSX Transportation (the "Railroad") appeals from the district court's judgment, upholding a jury verdict finding the Railroad liable under the Federal Employee's Liability Act ("FELA"), 45 U.S.C. § 51 *et seq*, and awarding $553,150 in damages to plaintiff-appellee Richard Rivenburgh for past and future pain and suffering resulting from a hearing loss he sustained on the job when an acetylene torch he was using created an explosive noise. On appeal, the Railroad challenges the district court's denial of its pre-trial motion under Fed.R.Civ.P. 56, and post-trial denial of the Railroad's motions under Fed.R.Civ.P. 50 & 59. We assume the parties' familiarity with the facts and procedural history of the case.

Initially, the Railroad's challenge to the district court's denial of its pre-trial motion for summary judgment is misplaced and is otherwise moot. In *Pahuta* v. *Massey-Fergeson, Inc.*, 170 F.3d 125 (2d Cir. 1999), we held that the defendant was not entitled to appeal from the denial of its motion for summary judgment where, as here, there was an intervening trial on the merits. While we have recognized exceptions to this rule based on "extraordinary" circumstances, *see id.* at 132, or where the denial of summary judgment rested on a "pure" legal error, *see Schaeffer* v. *State Ins. Fund*, 207 F.3d 139, 142 (2d Cir.2000), this case meets neither criteria.

Separately, the Railroad argues that the district court erred in denying its post-trial motions on the grounds that: (1) the jury's findings were the result of pure conjecture as to what caused Rivenburgh's injury; (2) Rivenburgh failed to prove that the injury

was foreseeable by the Railroad or that the Railroad had a reasonable opportunity to repair the allegedly dangerous condition; (3) the weight of the evidence was adversely impacted by the court's erroneous evidentiary rulings that allowed expert testimony by lay witnesses, including Rivenburgh, concerning the cause of his injury; and (4) the jury's damages award was excessive.

The first three of these challenges relating to liability are meritless. Under FELA, a railroad is liable to "any person suffering injury while he is employed by [the railroad] . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of [the railroad]." 45 U.S.C. § 51. We have explained that FELA is to be construed "in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation." *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) (citation omitted). Measured by these standards we find no error in the district court's assessment that the jury had before it sufficient evidence to conclude that the Railroad's negligence was a 60% cause of Rivenburgh's injury, that Rivenburgh was 40% comparatively at fault, and that the injury was sufficiently foreseeable to the Railroad. As the district court explained:

> The jury was entitled to infer, based on the testimony of Rivenburgh and [coworker Robert] Zinzow, that the presence of slag on the tip of the acetylene torch caused the loud noise that resulted in Rivenburgh's hearing loss. Rivenburgh and Zinzow both testified about the dangers of the acetylene torches and the possible consequence of falling to

> clean and inspect them prior to their use. Moreover Rivenburgh testified that he saw slag on the tip of the torch after hearing the loud noise.
>
> The jury was also entitled to find foreseeability because [the Railroad] trained its employees to inspect and clean acetylene torches prior to using them. . . . Furthermore, the jury could have reasonably concluded that [the Railroad], in part, was responsible for Rivenburgh's failure to detect the slag because its supervisors were pressuring him to expedite his work.

Rivenburgh v. *CSX Corp.*, No. 1:03-cv-1168, 2006 U.S. Dist. Lexis 62903, at *12-13 (N.D.N.Y. Sept. 5, 2006).

The Railroad claims however—perhaps rightly so—that the jury's liability finding necessarily hinged on the purportedly expert testimony of Rivenburgh and Zinzow concerning the cause of Rivenburgh's injury, and that the district court erred in admitting this testimony. But we may not reach this evidentiary challenge because it was not properly preserved below. *See* Fed.R.Evid. 103 ("Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."). Although the Railroad filed a pre-trial *in limine* motion seeking to preclude Rivenburgh (or anyone else) from offering expert testimony, the district court expressly reserved ruling on the motion, and, at trial, the Railroad failed to

timely object on expert-testimony grounds when the at-issue testimony was received into evidence.[2] Although the Railroad points us to record objections it made to parts of Rivenburgh's testimony, none of those objections were on expert testimony grounds. Moreover, while the Railroad did object on expert-testimony grounds to one question during Zinzow's testimony, the district court properly ruled that the question objected to did not call for expert testimony, and the Railroad failed to later timely object when the testimony arguably transcended into expert testimony. Accordingly, we reject the Railroad's challenges to the liability findings.

We are troubled by the damages award in this case, however, and on that basis we vacate the judgment in part. Our standard of review of damage awards is "whether the award is so high as to shock the judicial conscience and constitute a denial of justice." *O'Neill* v. *Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988); *see also Casey* v. *Long Island R.R. Co.*, 406

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[2] The district court's minute entry ruling on the *in limine* motion states:

> Atty. Bailey [for the Railroad] turns to Plaintiff as expert; Court RESERVES on this motion; Court states let plaintiff testify to facts and circumstances; views from facts of training; if transcends into expert, will not permit.

Even if, as the Railroad claims, this entry can be read as definitely precluding Rivenburgh from testifying as an expert, the district court clearly reserved ruling as to what testimony might transcend into the expert realm. And, to the extent there was any ambiguity in the district court's order, it was incumbent on the Railroad to cure it. *See* Fed.R.Evid. 103, advisory committee's note ("The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point.").

F.3d 142, 146-47 (2d Cir.2005). Contrary to the parties' suggestions, "the matter of the excessiveness of the jury's award does not present a question of law." *Casey*, 406 F.3d at 146. "Rather, it presents a question as to the proper evaluation of the evidence introduced at trial. That evaluation is not reviewed *de novo*, as a question of law would be, but rather is accorded deferential review." *Id.* at 146-47. When considering whether an award for damages is excessive, we may review awards in other cases involving similar injuries, while being cognizant of the fact that each judgment depends on a unique set of facts and circumstances. *Nairn* v. *National R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir.1988).

In this case, Rivenburgh presented expert medical testimony that he suffered a hearing loss at the conversational frequency in one ear, which now requires him to use a hearing aid in that ear. Rivenburgh claims that his injury was particularly harmful because a hearing loss at the conversational frequency affects daily life more so than hearing losses at other frequencies, and further because he already had a hearing impairment in his other ear. These considerations notwithstanding, our review of comparable cases involving hearing loss makes clear that the damages awarded to Rivenburgh is "shock [ingly]" excessive. *See O'Neill*, 839 F.2d at 13.

We begin with the cases relied upon by Rivenburgh. In *CSX Transportation, Inc.* v. *Long*, 703 So.2d 892 (Ala. 1996), the plaintiff was awarded $1,000,000 in damages by the jury for his hearing loss in both ears sustained from years of exposure to

train horns and machinery. *Id.* at 893-94.[3] The court, finding the verdict excessive, reduced it to $500,000. *Id.* at 899. And in *CSX Trans.* v. *Maynard*, 667 So.2d 642 (Ala. 1995), the jury awarded the plaintiff $325,000 in compensatory damages for a hearing loss suffered due to exposure to machines emitting loud noises. *Id.* at 643.[4]

Other hearing impairment cases we have found include *Mullet* v. *Wheeling & Lake Erie R.R. Co.*, No. 81688, 2003 Ohio App. LEXIS 2996, at *1 (Ohio Ct. App. June 26, 2003) (verdict of $102,000 for tennitus—a ringing in the ears); *CSX Transportation, Inc.* v. *Dansby*, 659 So.2d 35, 37-38 (Ala. 1995) (verdict of $105,000 for hearing loss at the conversational level); *CSX Transportation, Inc.* v. *Bryant*, 589 So.2d 706 (Ala. 1991) (verdict of $25,000 for loss of hearing). And, in *Guerrero* v. *American President Lines, Ltd.*, 394 F.Supp. 333 (N.D.N.Y. 1975), a plaintiff who suffered a partial hearing loss *and* total

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[3] Although the decision in *Long* does not specify whether this amount was for pain and suffering, we assume for purposes of our discussion that it was. Unless otherwise noted, our approach is the same with respect to the damages awards in the other comparative cases cited herein.

[4] Rivenburgh also relies on *Ruiz* v. *Southern Pacific Transportation Co.*, No. C033446, 2003 Cal. App. Unpub. Lexis 3057 (Cal. Ct. App. Mar. 2003) (upholding an award of $495,000 reflecting a 12.5% reduction for comparative negligence and other causes), but under California's court rules, neither Rivenburgh nor we are permitted to rely on this opinion. *See* Cal. R. Ct. 8.1115(a). Even if we were to, it would not affect our decision in this case.

loss of taste and smell received a verdict of $200,000. *Id.* at 338.[5]

Rivenburgh, by stark contrast, was awarded $1,000,000 in damages (comprised of $600,000 for past pain and suffering and $400,000 for future pain and suffering).[6] Rivenburgh's $1,000,000 jury verdict is significantly more than that awarded in the cases Rivenburgh himself relies upon, and is exponentially greater than the other comparative cases we have identified. While cognizant that pain and suffering damages are not readily quantifiable by any mathematical or scientific precision, Rivenburgh's award clearly "falls outside a reasonable range of awards." *See DiSorbo* v. *Hoy*, 343 F.3d 172, 184 (2d Cir. 2003). We believe that an award of $400,000 in damages (comprised of $240,000 in past pain and suffering and $160,000 in future pain and

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[5] We also take notice of the summaries of the verdicts in *Collins* v. *South Buffalo Railway*, 1999 WL 33484398 (N.Y. Sup. Ct. 1991) (verdict including $50,000 for pain and suffering based on severe hearing loss); *Faraci* v. *Long Island Railway. Co.*, 1978 WL 208576 (N.Y. 1978) (verdict of $160,000, before reduction for comparative negligence, for hearing loss at high-frequency level).

[6] Rivenburgh's $1,000,000 award was reduced by 40%, to $600,000, to account for Rivenburgh's comparative negligence, and further reduced by the district court to $553,150, to account for a 2% reduction in present value for future pain and suffering. For purposes of our comparison to other cases, we consider his award to be $1,000,000, rather than the adjusted figure of $553,150. The alternative approach would be to adjust the verdicts in the comparative cases to account for identical adjustments in Rivenburgh's case for comparative negligence and present value. The same ratios obtain by either means.

suffering)[7] is more keeping with reason. That $400,000 figure, of course, must further be reduced by 40% to $240,000 (to account for Rivenburgh's comparative negligence) and for future value.

We remand for a new trial on damages, but leave Rivenburgh the option of forgoing a new trial on damages if he agrees to remit any damages above our adjusted figure of $240,000. *See id.* at 189 (providing plaintiff a similar option); *Lee* v. *Edwards*, 101 F.3d 805, 813 (2d Cir. 1996) (same). Rivenburgh is directed to inform the district court in writing, with a copy to this Court, within fifteen days of the issuance of our mandate concerning his intent to remit or retry. Should Rivenburgh agree to remit, the parties are further directed to reach agreement on what the appropriate reduction for present value should be, and, if they cannot agree, the district court shall decide the issue.

For the foregoing reasons, the judgment is AFFIRMED in part, and VACATED in part with instructions.

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[7] Our breakdown for past and future pain and suffering is based on the same 6:4 ratio reflected in the jury's award.

APPENDIX B

United States District Court, N.D. New York.

Richard RIVENBURGH, Plaintiff,

v.

CSX CORPORATION, Defendant.

No. 1:03-CV-1168 (GLS).

Sept. 5, 2006.

Kleeman, Abloeser Law Firm, Samuel Abloeser, Esq., of counsel, Philadelphia, PA, for the Plaintiff. Hodgson, Russ Law Firm, Noreen D. Grimmick, Esq., of counsel, Albany, NY, for the Defendant.

MEMORANDUM-DECISION AND ORDER

GARY L. SHARPE, District Judge.

I. *Introduction*

Richard Rivenburgh sued his railroad employer, CSX Corporation (CSX), pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 *et. seq.*, claiming that he sustained hearing loss in an accident caused by CSX's failure to provide him with a safe working environment. After a jury returned a verdict in Rivenburgh's favor, CSX moved for judgment notwithstanding the verdict or, alternatively, a new trial, see *Dkt. No. 102*; see *also* FED. R. CIV. P. 50 & 59, and Rivenburgh opposed. *See Dkt. Nos. 105, 106.* For the following reasons, CSX's motions are denied.

II. *Background*

After Rivenburgh completed his direct case, CSX moved for judgment as a matter of law. *See Dkt. No. 88 (Minute Entry).* CSX supplemented its motion at the conclusion of the case, and the court reserved. Thereafter, the jury found CSX negligent, and Rivenburgh 40% at fault, comparatively. *See id.* Rivenburgh was awarded $600,000.00 in past pain and suffering and $400,000.00 in future pain and suffering.[1] *See id.* CSX then moved to set aside the verdict, and the court reserved decision pending the parties' additional submissions. *See id.*

III. *Facts*[2]

On October 12, 2000, Rivenburgh had been employed as a car inspector at CSX's Selkirk, New York Yard for approximately fifteen years. *See* (Tr. at 58), *Dkt. No. 100.* On that day, he was repairing boxcars in the Departure Yard Building. *See id.* He was not wearing hearing protection. *See* (Tr. at 70). He was assigned to perform various repairs, perform a brake test on an outbound train, and to replace a cutting lever on a railroad car. *See* (Tr. at 59, 61). Beforehand, he requested additional assistance, but no help was sent. *See* (Tr. at 60).

In order to replace the cutting lever, Rivenburgh had to use an acetylene torch. *See id.* He had been trained on acetylene torch use through classroom instruction and hands-on experience. *See* (Tr. at 55).

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[1] As to future pain and suffering, the parties stipulated to a life expectancy of 21.7 years and a two percent discount rate.

[2] Although application of the differing Rule 50 and 59 standards can result in facts and reasonable inferences that vary, there are no significant differences in this case.

At the time of the accident, he had thirty years experience using the torch. *See id.*

He retrieved a torch from the only repair car in the yard. *See id.* Before striking the igniter to light it, he examined it "the best he could."[3] *See* (Tr. at 62). He conceded at trial that he did not see slag when he initially examined the torch. *See* (Tr. at 64).

When he turned on the oxygen tank and struck the igniter, the torch made a loud noise. *See id.* He characterized the noise as an "explosion," explaining that "the next thing [he] knew, [he] was on [his] knees and . . . was holding [his] ears because [he] couldn't hear nothing [sic]." *Id.* He described the noise as "the worst noise [he] ever heard." *Id.* After the explosion, he retrieved the torch and inspected it, and noticed that slag was embedded on the tip. *See* (Tr. at 66). He turned the torch off and placed it back in the repair truck. *See id.* According to CSX's safety documents, it was aware of hazzards associated with acetylene torch use, including "[b]lowback of hot slag because of . . . explosive gases accumulating. . . ." *See Exhib. List D-7. Dkt. No. 92.*

Rivenburgh returned to the office where he filled out a safety report. *See* (Tr. at 68). He recalled having a headache, feeling dizzy and disoriented, and feeling pain in his ears, neck, and head immediately after the incident *See* (Tr. at 68, 69). According to his medical expert, he suffered a permanent, irre-

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[3] He explained that he felt "rushed," and felt that he "didn't have the time" to adequately inspect the torch prior to using it. (Tr. at 62). *Dkt. No. 100.* He further testified that he "was doing three other jobs at once and [his supervisors] were calling [him] every ten minutes on the radio asking [him] have you done that job, are you completed yet [sic]. . . ." *Id.*

versible hearing loss in his right ear at the conversational level. *See* (Tr. at 62).

IV. *Discussion*

A. *Standard of Review*

1. Rule 50

"Judgment as a matter of law is proper when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.' " *U.S.* v. *Space Hunters, Inc.*, 429 F.3d 416, 428 (2d Cir. 2005) (citing FED. R. CIV. P. 50(a)(1)). The court must "consider the evidence in the light most favorable to the party against whom the motion was made and ... give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence." *Id.* at 429 (internal quotation marks and citation omitted); *see also Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." *Space Hunters*, 429 F.3d at 429 (internal quotation marks and citation omitted). "A jury verdict should be set aside only where there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.'" *Id.* (citing *Song* v. *Ives Laboratories, Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992)).

2. Rule 59

Rule 59(a)(1) of the Federal Rules of Civil Procedure provides that "[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States [.]" FED. R. CIV. P. 59. This standard permits new trials when "in the opinion of the district court, the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice." *DLC Mgmt. Corp.* v. *Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir. 1998) (quotation marks and citation omitted). "A new trial may be granted, therefore, when the jury's verdict is against the weight of the evidence." *Id.* Unlike the standard of review applicable to a Rule 50 motion, ". . . a trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner . . . A court considering a Rule 59 motion for a new trial must bear in mind, however, that the court should only grant such a motion when the jury's verdict is egregious." *Id.* at 134 (internal quotation marks and citation omitted). A trial judge's disagreement with the jury's verdict alone is insufficient reason to grant a motion for a new trial. *See Saloomey* v. *Jeppesen & Co.*, 707 F.2d 671, 679 (2d Cir. 1983).

B. *Motions*

In support of its Rule 50 motion, CSX argues that it is entitled to judgment as a matter of law because the jury's findings were the result of surmise and conjecture. As to its Rule 59 motion, it argues that the jury's verdict was egregious. Whether the court applies the Rule 50 or 59 standard of review, it reaches the same conclusion; namely, the jury's ver-

dict is supported by competent evidence, and CSX's motions are without merit.

CSX specifically contends that Rivenburgh failed to prove: (1) that CSX's negligence caused his injury; (2) that CSX knew or should have known of a dangerous condition or that Rivenburgh's injury was foreseeable by CSX; and (3) that CSX had a reasonable opportunity to repair the dangerous condition. CSX also argues that the weight of the evidence was adversely impacted by erroneous evidentiary rulings that allowed expert testimony by lay witnesses concerning the cause of the loud noise. Moreover, CSX argues that the jury's finding that Rivenburgh was forty percent comparatively negligent and that CSX was sixty percent comparatively negligent was against the weight of the credible evidence. Finally, CSX argues that the award in the amount of $600,000.00 for past pain and suffering and $400,000.00 for future pain and suffering was excessive, and a new trial should be ordered on the issue of damages.

1. The Jury's Finding of Negligence

Regarding its negligence contentions, CSX argues that it is pure speculation that: (1) there was slag embedded on the tip of the torch prior to the loud noise; (2) that CSX should have known about the existence of any slag on the torch prior to the time Rivenburgh used it; and (3) that CSX had a reasonable opportunity to repair or fix the torch prior to Rivenburgh's use. Rivenburgh counters that given the relaxed FELA negligence standards, the evidence sufficiently supported the jury's conclusion that CSX was partly liable for his injury.

Under FELA, a railroad engaged in interstate commerce is liable to "any person suffering injury while he is employed by [the railroad] . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of [the railroad]." 45 U.S.C. § 51. The Act requires covered employers "to provide its employees with a reasonably safe place to work." *Sinclair* v. *Long Island R.R.*, 985 F.2d 74, 76 (2d Cir. 1993) (citation omitted). The Second Circuit construes the statute, "in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation." *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402 , 406 (2d Cir. 1999) (citation omitted). "The Act requires an employer to provide its employees with a reasonably safe place to work, . . . and this includes the duty to maintain and inspect work areas." *Sinclair*, 985 F.2d at 76 (citation omitted). The scope of this ongoing duty is clear. "An employer breaches its duty to provide a safe workplace when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform and protect its employees." *Gallose* v. *Long Island R.R.*, 878 F.2d 80, 84-85 (2d Cir. 1989) (citation omitted).

In addition, "reasonable foreseeability of harm is an essential ingredient of [FELA] negligence." *Gallick* v. *Baltimore and Ohio R.R. Co.*, 372 U.S. 108, 117 (1963) (citation omitted). The reasonable foreseeability element in FELA actions "requires proof of actual or constructive notice to the employer of the defective condition that caused the injury." *Sinclair*, 985 F.2d at 77. "The issue of notice typically presents a question of fact." *Paul* v. *Genesee & Wyo. Indus., Inc.*, 93 F. Supp. 2d 310, 318 (W.D.N.Y. 2000) "[A]s with all factual issues under FELA, the right of the jury to pass on this issue must be liberally con-

strued." *Herbert* v. *Nat'l R.R. Passenger Corp.*, 92-cv-6937, 1995 U.S. Dist. LEXIS 12402, at *7 (S.D.N.Y. Aug. 28, 1995) (citing *Gallose* v. *Long Island R.R. Co.*, 878 F.2d 80, 85 (2d Cir. 1989)). "This is especially true in negligence actions brought under the FELA, where 'the role of the jury is significantly greater . . . than in common law negligence actions,' and where the jury's right to pass upon the question of the employer's liability 'must be most liberally viewed.'" *Gallose*, 878 F.2d at 84 (citation omitted).

However, "FELA is not a strict liability statute, . . . and the fact that an employee is injured is not proof of negligence." *Williams*, 196 F.3d at 406 (citation omitted). "FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." *Capriotti* v. *Consol. Rail Corp.*, 878 F.Supp. 429, 431 (N.D.N.Y. 1995) (citation omitted). Thus, "the traditional common law negligence elements of duty, breach, causation and damages are still applicable." *Id.* Causation, for example, can be established by showing that employer negligence played any part, even the slightest, in producing the injury for which damages are sought. *See Williams*, 196 F.3d at 406. Under this standard, FELA defendants may be held liable for injuries that would be considered too remote under common law. *See id.* at 407.

The court is unpersuaded by CSX's argument that a reasonable and fair-minded jury could not have arrived at the instant verdict based on the trial evidence. The parties do not dispute that CSX owed Rivenburgh a duty to provide a safe work environment, and that element is clearly established. As to causation, Rivenburgh had to establish that CSX's

negligence played a part, even the slightest, in producing the injury for which damages were sought. *See Williams*, 196 F.3d at 406. The jury was entitled to infer, based on the testimony of Rivenburgh and Zinzow, that the presence of slag on the tip of the acetylene torch caused the loud noise that resulted in Rivenburgh's hearing loss. Rivenburgh and Zinzow both testified about the dangers of acetylene torches and the possible consequences of failing to clean and inspect them prior to their use. Moreover, Rivenburgh testified that he saw slag on the tip of the torch after hearing the loud noise.

The jury was also entitled to find foreseeability because CSX trained its employees to inspect and clean acetylene torches prior to using them. At trial, CSX introduced a document entitled, "Proper Use of Cutting Torches." *See Exhib. List D-7, Dkt. No. 92.* That document recites safety procedures taught to CSX employees, such as "inspecting torch ... for any defects and correct." *Id.* It also lists four "specific hazards" resulting from the failure to follow safety procedures, including, "[b]lowback of hot slag because of haste or lack of awareness[,] . . . [and] explosive gases accumulating . . . - torch not properly turned off." *Id.* Clearly, these safety measures reflected CSX's knowledge that acetylene torches could be dangerous if not cared for properly. Based on the testimony of Rivenburgh and Zinzow, coupled with the trial exhibit, a reasonable jury could infer that a CSX employee's failure to properly inspect and clean the torch caused the explosion. Furthermore, the jury could have reasonably concluded that CSX, in part, was responsible for Rivenburgh's failure to detect the slag because its supervisors were pressuring him to expedite his work.

As stated, the relaxed negligence standard under FELA is whether the employer's negligence played any part, even the slightest, in the plaintiff's injury. *See Williams,* 196 F.3d at 406. Thus, the evidence was sufficient to support the jury's conclusion that CSX was liable for Rivenburgh's injury.

2. Erroneous Evidentiary Ruling: Expert Testimony

Before trial, CSX filed a motion *in limine* seeking to preclude testimony from Rivenburgh and a co-employee, Zinzow, concerning the cause of the explosion. *See Dkt. No. 63.* The court reserved decision, but ordered Rivenburgh to limit his and Zinzow's testimony to facts and observations they experienced while using acetylene torches. The court also advised CSX's counsel that it would revisit the issue in the event that Rivenburgh sought to convert lay witness observations into expert opinion.

CSX now argues that Rivenburgh and Zinzow impermissibly gave expert testimony regarding the cause of the loud noise emitted from the acetylene torch.[4] Therefore, CSX concludes, the jury's verdict cannot survive scrutiny if that testimony is excised from the record. According to CSX, Rivenburgh testified in his pretrial deposition that he had never known of an acetylene torch causing a loud noise. CSX next contends that Rivenburgh purposefully de-

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[4] Rivenburgh contends that CSX failed to renew its pre-trial objection, and waived it. As to waiver, Rivenburgh also points out that CSX objected only once during Zinzow's testimony on the basis of improper expert testimony, and the court overruled that objection. Because Rivenburgh and Zinzow provided proper lay witness testimony under the Federal Rules of Evidence, analysis of the waiver argument is unnecessary.

viated from that statement at trial when he testified that he believed the loud noise was caused by slag buildup on the tip of the torch. CSX maintains that this inconsistency allowed Rivenburgh to circumvent Federal Rule of Evidence 701, which prohibits lay witnesses from testifying to scientific, technical, or other specialized knowledge. *See FED. R. EVID. 701 (2001).*

Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701. Rivenburgh testified at trial that inspection of the torch was necessary so that "you wouldn't have a problem of slag building up onto it, and you wouldn't have a problem with the torch exploding, so it's a safe tool to use." *See* (Tr. at 51-52), *Dkt. No. 100.* These observations were preceded by testimony that he had thirty years experience working with an acetylene torch. *See* (Tr. at 13-18, 51, 55, 78). Zinzow testified about the hazards of slag on the tip of the torch after it was established that he had used the torch thousands of times. *See* (Tr. at 183), *Dkt. No. 101.*

Rivenburgh and Zinzow testified not as experts, but as lay witnesses. Their testimony was based on their own experiences and perceptions, and it was

helpful to the jury in determining what happened on October 12, 2000. Moreover, neither Rivenburgh nor Zinzow used hyper-technical language or scientific terminology during their testimony. Instead, they used lay persons' terms, and their observations were based on their own years of experience working with an acetylene torch like the one that caused Rivenburgh's injury. Furthermore, the observations were consistent with the training they received and consistent with CSX's own safety literature.

CSX characterizes Rivenburgh's deposition and trial testimony as inconsistent, but the court disagrees. Rivenburgh testified during his deposition that he did not know that a loud noise was a risk associated with the use of a torch. That observation is not inconsistent with his trial testimony that he was taught to clean and inspect the torch prior to using it so that slag would not build up at the tip of the torch. Moreover, Rivenburgh had thirty years experience using an acetylene torch, and while he may not have been aware of a loud noise risk, he could still testify to the facts he learned during his thirty years experience. Accordingly, this argument lacks merit, and the testimony of Rivenburgh and Zinzow was properly admitted. So too, that testimony was appropriately considered by the jury in reaching its verdict.

3. Comparative Negligence

In conclusory fashion, CSX argues that the jury's assessment of liability is against the weight of the credible evidence. The court is not persuaded that the jury's verdict is either egregious or constitutes a miscarriage of justice. There is no doubt that there was slag on the tip of the torch after the loud noise, and that the slag was present due to someone's neg-

ligence. Rivenburgh admitted that he was partly negligent because he did not sufficiently inspect the torch prior to using it. He also offered circumstantial evidence of CSX's negligence; namely, some CSX employee failed to clean the torch. Precisely who was negligent and to what degree were factual issues squarely presented to the jury, and resolved by them. Despite CSX's general argument that there was no evidence of negligence or foreseeability, there was ample evidence presented at trial that slag on the tip of the torch caused a loud noise and that the presence of slag buildup was partly due to the negligence of a CSX employee. Accordingly, CSX's argument is unpersuasive.

4. Excessiveness of the Verdict

a. Damages

CSX contends that the jury's damage award for past and future pain and suffering is excessive as a matter of law and warrants a new trial on this issue. It argues that Rivenburgh adduced no evidence demonstrating that he suffered pain.[5] Rivenburgh maintains that given the evidence, the damages award

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[5] In the sentence following CSX's assertion to that effect, it states, "plaintiff claimed only on the day of the accident to have experienced a headache, dizziness, and disorientation." *Dkt. No. 108.* Moreover, CSX continues, "plaintiff's wife testified that for approximately one week, plaintiff withdrew from the family, spent a lot of time in bed . . . and was lost." *Id.* CSX further claims that Rivenburgh did not testify to any pain, suffering, or loss of enjoyment of life. CSX's position lacks merit. Clearly, Rivenburgh testified that he experienced pain on the day of the explosion. Moreover, he testified that the quality of his life had changed due to the hearing loss he suffered as a result of the explosion. *See* (Tr. at 69, 70, 73, 74, 86, 87), *Dkt. No. 100.*

ought not shock the judicial conscience and should be upheld.

"If a district court finds that a verdict is excessive, it may order a new trial, a new trial limited to damages, or, under the practice of remittitur, may condition a denial of a motion for a new trial on the plaintiff's accepting damages in a reduced amount." *Ahlf* v. *CSX Transp.*, 386 F. Supp. 2d 83, 87 (N.D.N.Y. 2005) (citation omitted). "A jury verdict is not, certainly, something lightly to be set aside." *Id.* (citing *Nairn* v. *Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 566 (2d Cir. 1988)). Whether a verdict is excessive is a question of law. *See id.* A verdict is considered excessive when it "'shocks the judicial conscience,' and . . . exceeds what a reasonable jury could have returned for the plaintiff if it followed the court's instructions." *Id.* (citing *Mazyck* v. *Long Island R.R. Co.*, 896 F.Supp. 1330, 1336 (E.D.N.Y. 1995)). However. "the jury's award should not be disturbed unless 'the quantum of damages found by a jury is clearly outside the maximum limit of a reasonable range.'" *Id.* (citation omitted). A court's consideration of the excessiveness of a jury award turns on the particular facts of each case. *See Ahlf*, 386 F. Supp. 2d at 88. Moreover, a court reviewing a jury award must view "the evidence pertaining to pain and suffering in the light most favorable to the plaintiff[.] . . ." *Id.* (internal quotation marks and citation omitted).

Maintaining that the verdict was excessive because Rivenburgh suffered hearing loss at only one frequency, CSX cites a New York appellate case that considered such damages for a partial hearing loss.

See Preston v. *Young*, 239 A.D.2d 729 (1997).[6] As Rivenburgh points out, *Preston* is factually distinguishable. First, the plaintiff in *Preston* sought recovery for an alleged injury to his right ear that he suffered in a 1993 accident. *See id.* at 729. Secondly, the plaintiff's hearing loss in *Preston* was at a level for high pitches and did not hinder his ability to hear normal conversations. *See id.* at 731. Thus, *Preston* is not directly on point.

When assessing the excessiveness of a jury award, "courts have found it useful to review awards in other cases involving similar injuries, while bearing in mind that any given judgment depends on a unique set of facts and circumstances." *Ahlf*, 386 F. Supp. 2d at 88 (internal quotation marks and citation omitted). In CSX Transportation v. *Long*, the plaintiff sued CSX for hearing loss sustained from years of exposure to train horns and machinery. *See CSX Transp.* v. *Long*, 703 So.2d 892 (1996). The jury returned a $1,000,000.00 verdict, and the Supreme Court of Alabama reduced it to $500,000.00. *See id.* at 899. In *CSX Transportation* v. *Maynard*, the jury awarded the plaintiff $325,000.00 in compensatory damages for hearing loss he suffered due to exposure to machines emitting high noise levels. *See CSX Transp.* v. *Maynard*, 667 So.2d 642, 643 (1995). In

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[6] CSX points out that there are eight different frequencies of hearing in each ear. The frequency levels are: 250, 500, 1000, 2000, 3000, 4000, 6000, and 8000. CSX maintains that if only the 2000 frequency level in the right ear was damaged as a result of the explosion, then only one sixteenth of Rivenburgh's total hearing was injured. *See Dkt. No. 102.*

In *Preston*, the court upheld the jury's award of $2,000.00 for past pain and suffering and $23,000.00 for future pain and suffering. *See Preston*, 239 A.D.2d at 730.

Guerrero v. *American President Lines, Ltd.*, the Northern District of New York upheld a verdict in the amount of $200,000.00 for the plaintiff's 55% loss of hearing and total loss of taste and smell. *See Guerrero* v. *Am. President Lines, Ltd.*, 394 F. Supp. 333, 338 (1975). The Court of Appeals of Ohio recently affirmed a jury verdict of $102,000.00 in favor of a plaintiff after he suffered from tinnitus[7] due to an explosion of a safety device nearby. *See Mullet* v. *Wheeling & Lake Erie Ry. Co.*, No. 81688, 2003 Ohio App. LEXIS 2996, at *1 (Ct. App. Ohio June 26, 2003).

Rivenburgh suffered a permanent, irreversible hearing loss in his right ear at the conversational level. *See* (Tr. at 62), *Dkt. No. 100.* His hearing was strained prior to the explosion, and the additional hearing loss worsened his quality of life. He testified that the accident resulted in his having to wear a hearing aid in his right ear. *See* (Tr. at 73). He also explained to the jury that when he takes the hearing aids out at night, he has to have:

> two alarm clocks wake [him] up in the morning, one has big dials like this [sic] and another one to back that up. [He] can't hear the phone, the TV playing. [He] ha[s] a constant ringing all the time . . . , constant humming. Everybody—for the first six months after the accident ... sounded like they were talking like Mickey Mouse, that' s how bad it was.

(Tr. at 73). Moreover, the ringing and humming in his ear worsened after the accident. *See* (Tr. at 74).

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[7] Tinnitus is "a noise in the ears, such as ringing, buzzing, roaring or clicking." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 807 (28th ed.1994).

He explained that his normal voice is now at a shouting level, and that he has to "stare at people to hear what they are saying." *Id.* Dr. Tan also testified that Rivenburgh's hearing loss was permanent, irreversible, and medically diagnosed. *See Dr. Tan's videotape testimony; Exhib. List P-8. Dkt. No. 92.* As the finder of fact, the jury was entitled to credit Dr. Tan's opinion.

On the basis of the testimony of Rivenburgh and Dr. Tan together with other medical evidence admitted at trial, the jury's award was justified. Although the award may be high in light of the cited cases given the type of injury suffered by Rivenburgh, the award does not "shock the judicial conscience." Moreover, the award is not so grossly excessive as to constitute a miscarriage of justice.

b. Discounted Future Damages

The parties disagree in their calculations of the present value of the future damages award. The parties agreed to apply a two percent discount rate to any award for future pain and suffering. Subsequently, both parties submitted calculations performed by their own financial experts as to the present value of $400,000.00, *see Dkt. Nos. 105(4), 107*, and those submissions are inconsistent.[8] *See id.* Neither party has explained the difference. Accordingly, the court reserves on this aspect of the motions, and affords the parties an additional fourteen days to explain the difference, or reach an agree-

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[8] FN8. Rivenburgh's economic expert calculated the present value of $400,000.00 at $328,239.00 (at a 2% discount rate), and CSX's expert calculated the present value of $400,000.00 at $321,916.99 (also at a 2% discount rate). *See Dkt. Nos. 105(4), 107.*

ment. Absent an agreement, the court will either resolve the issue on the basis of the additional submissions, or schedule a hearing.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that CSX's motions for judgment notwithstanding the verdict or, alternatively, for a new trial are **DENIED**, and it is further

ORDERED that the court reserves on the entry of judgment of the jury's $400,000.00 award for future pain and suffering, and it is further

ORDERED that the parties submit a stipulation regarding the discounted value of the award for future pain and suffering or, alternatively, explanations for their differing calculations within **FOURTEEN (14) DAYS** from the filing date of this Memorandum-Decision and Order.

IT IS SO ORDERED.

APPENDIX C

The Federal Employer's Liability Act, 45 U.S.C. §§ 51-60, provides as follows:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by

such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held

to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if

none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Supreme Court, U.S.
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08-269

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

RICHARD RIVENBURGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondent does not dispute the Statement of the Case provided by the Petitioner.

STATEMENT OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI FILED BY THE CSX TRANSPORTATION, INC.

Rule 15.2 of the Rules of this Court directs counsel for the Respondent to call to the attention of this Court in the Brief in Opposition any objection to consideration of a question presented based on what occurred in the proceedings below. Adams v. Robertson, 117 S. Ct. 1028, 1032 (1997). Accordingly, the Respondent hereby brings to the attention of this Court that the issues sought to be presented in the present Petition for a Writ of Certiorari were not advanced or preserved in either the United States District Court for the Northern District of New York or the United States Court of Appeals for the Second Circuit.

The Petitioner presents two questions to this Court: whether there should be a relaxed standard of causation under the Federal Employers' Liability Act, 45 U.S. Code § 51-60, and, second, whether there should be a relaxed standard of negligence under that Act. However, in the lower courts, the standard of causation and the standard of negligence were not challenged in this fashion by the Petitioner. Therefore, the Court should decline to entertain these claims at this time.

Attached to the Petition for a Writ of Certiorari as Exhibit B is a copy of the Memorandum-Decision-Order of the United States

District Court for the Northern District of New York dated September 5, 2006. As this Court will see, District Judge Gary L. Sharpe ruled against the Petitioner with respect to its post trial motion for judgment notwithstanding the verdict and for a new trial. In those pleadings, the Petitioner argued the following issues:

> (1) CSX was entitled to judgment as a matter of law because the findings of the jury were the result of surmise and conjecture and were not supported by competent evidence;
> (2) The Respondent failed to prove causation;
> (3) The Respondent failed to prove that the Petitioner was on notice of a dangerous condition;
> (4) The Respondent failed to prove that the Petitioner had a reasonable opportunity to repair a dangerous condition;
> (5) The weight of the evidence was adversely impacted by erroneous evidentiary rulings at trial;
> (6) The jury's findings regarding comparative negligence were against the weight of the credible evidence; and
> (7) The award was excessive. (15a)

In dismissing the Petitioner's arguments, the District Court noted that it was following the well settled standards for negligence and causation set forth in Williams v. Long Island Railroad Company, 196 F. 3d 402 (2nd Cir. 1999) (16a-17a). The District Court proceeded to discuss the evidence in light of those standards of negligence and causation. At no point did the District Court have to address an issue regarding the validity of those standards since such a claim was not raised before the District Court.

On appeal to the United States Court of Appeals for the Second Circuit, the Petitioner raised the following issues:

> (1) The District Court had erred in denying the Petitioner's pretrial motion for summary judgment;
> (2) The District Court had erred in denying its post-trial motion that the findings of the jury were the result of conjecture as to causation;
> (3) The District Court had erred in denying the Petitioner's post-trial motion that the Respondent had failed to prove that the Petitioner had notice of a dangerous condition;
> (4) The District Court had erred in denying the Petitioner's post trial motion that the weight of the evidence was adversely impacted by the trial court's erroneous evidentiary rulings; and

(5) The District Court had erred in denying the Petitioner's post trial motion that the jury's damage award was excessive (2a-3a).

In deciding that appeal, the Court of Appeals applied the relaxed standard for negligence and causation as set forth in its ruling in Williams v. Long Island Railroad Company, supra. The court found no error in the District Court's assessment that the jury had before it sufficient evidence to support its verdict as it measured the evidence by the Williams standards. There is nothing in the Opinion which discusses the validity or propriety of those standards since those issues were not raised in the Court of Appeals. See Appendix A, the disposition of this case in the United States Court of Appeals for the Second Circuit dated May 30, 2008.

In the present petition, the Petitioner seeks a grant of certiorari so that this court can resolve a question allegedly left open in Norfolk Southern Railway Company vs. Sorrell, 127 S. Ct. 799 (2007), to wit, whether in an action under this Act, the Plaintiff must prove that the defendant's negligence was the proximate cause of the injury or need satisfy only "a relaxed standard" of causation and of negligence. While it is true that the decision in Norfolk was not released until January 10, 2007, which was subsequent to the Petitioner's brief in the Second Circuit of Appeals (filed December 1, 2006), the Respondent notes that no further submissions

were offered to the United States Court of Appeals for the Second Circuit after the Norfolk decision on January 10, 2007 and before the ruling in this case by the Court of Appeals on May 30, 2008. Under Rule 28(j) of the Rules of Appellate Procedure, when pertinent and significant authorities come to a party's attention after the party's brief has been filed, the party may advise the circuit clerk by letter setting forth such a citation and offering reasons for the reference. According to the Commentary to the Rule, the Rule does not forbid "argument" with respect to this reference. Nevertheless, no such letter was submitted by the Petitioner to the Court of Appeals after this Court decided Norfolk, supra.

Furthermore, a review of the Norfolk case reveals that it was based upon an assessment of this Court's earlier decision in Rogers v. Missouri Pacific Railway Company, 352 U.S. 500 (1957). An inspection of the Brief filed on behalf of the Petitioner in the Court of Appeals shows that the Rogers case is not even mentioned (see Petitioner's Brief for Appellant in the Court of Appeals for the Second Circuit, pages iii-iv).[1]

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[1] The Table of Authorities in the Petitioner's Brief before the United States Court of Appeals for the Second Circuit is limited to cases involving the four issues set forth in the Issues Presented section of the Brief. They were as follows: 1. Did the trial court commit error or abuse its discretion when it refused to grant Defendant's motion for summary judgment? 2. Did the trial court commit error or abuse its discretion when it refused to grant Defendant's motion pursuant to FRCP 50 and 59? 3.

Of course, the reason for this omission is that the Rogers case, and the related issue of the propriety of the standards of negligence and causation, was not presented in the Petitioner's appeal before the Second Circuit Court of Appeals.[2]

It is well settled by the jurisprudence of this

Did the trial court commit error or abuse its discretion when it permitted the Plaintiff and his coworker Mr. Zinzow to offer expert opinion testimony over the objection of defense counsel? and 4. Did the trial court abuse its discretion by admitting into evidence a torch tip that was not similar to the torch tip which was used by the plaintiff at the time he was injure? No issue was presented regarding a challenge to Rogers, supra, or Williams, supra, in the Brief for the Petitioner in the Court of Appeals.

[2] In the Petition for a Writ of Certiorari at page 22, the Petitioner cites two other cases decided by this Court concerning the issue of causation discussed in Rogers, to wit, Crane v. Cedar Rapids and Iowa City Railway Company, 395 U.S. 314 (1969) and Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994). Like the situation with regard to Rogers, supra, neither Crane nor Gottshall was cited or referenced in the Petitioner's submissions before either the United States District Court or the United States Court of Appeals. The same is true with regard to the citation in the Petition for a Writ of Certiorari at page 24 of the case of Gautreaux v. Scurlock Marine, Inc.107 F. 3d 331 (5th Cir. En Banc 1997), as a basis for the Petitioner's challenge on the standard of care issue. As this Court will note, the decision in Gautreaux was never presented in any of the briefs filed on behalf of the Petitioner in the lower courts.

court that an issue will not be addressed for the first time by the United States Supreme Court where it has not been properly advanced and preserved before the lower courts. Hall Streets Associates, LLC v. Mattel, Inc., 128 S. Ct. 1396, 1407 (2008); Travelers Insurance Company v. Pacific Gas and Electric Company, 127 S. Ct. 1199, 1207 (1007); MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764, 776 (2007). In accord is Regal v. Medtronic, Inc., 128 S. Ct. 999, 1011 (2008) (when a contention is raised in the Supreme Court in the first instance, this Court will not address the argument where it was not presented in the party's Brief in the United States Court of Appeals for the Second Circuit).

In the instant case, the question whether the standard of causation under FELA is proximate causation or some less stringent standard is not ripe for definitive resolution by this Court in the present case. The same waiver analysis applies to the question whether there is a relaxed standard of negligence under the Act. Therefore, this Court should exercise its discretion to decline to grant certiorari as to either of these issues.

CONCLUSION

The Respondent Richard Rivenburgh respectfully submits that the Petition for a Writ of Certiorari filed with this Court on behalf of CSX Transportation, Inc. should be denied.

Respectfully submitted,

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(4)

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No. 08-269

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

RICHARD RIVENBURGH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. This case presents two related questions: whether there is a "relaxed" standard of causation under the Federal Employers' Liability Act (FELA or the Act) and whether there is a "relaxed" standard of negligence under the Act. As the petition demonstrates, and as the *amicus* brief filed by the Association of American Railroads confirms, those questions are ripe for resolution by this Court. *First*, the standard of causation under FELA was left open in *Norfolk Southern Railway Co.* v. *Sorrell*, 127 S. Ct. 799 (2007), and addressed by four Justices in the case in two concurring opinions, which took different positions on the issue. *Second*, the lower courts are deeply divided on both the causation standard (as Justice Souter observed in his *Sorrell* concurrence) and the negligence standard (as the Second Circuit acknowledged in a prior case). *Third*, the "relaxed" standards are flatly inconsistent with this Court's settled interpretive methodology, reaffirmed in *Sorrell*, which deems FELA to have incorporated common-law principles unless the statute expressly says otherwise. *Fourth*, the standards for these two basic elements are at issue in all FELA cases (of which there are approximately 5,000 per year), at every stage of the litigation, and in all cases brought under the Jones Act. *Fifth*, the cases show that the choice of standard—common-law or "relaxed"—often determines the outcome.[1]

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[1] We mistakenly stated in the petition (at 31) that the trial court in *Sievert* v. *CSX Transportation, Inc.*, No. CI0200504624, 2008 WL 3819782 (Ohio Ct. Com. Pl. June 22, 2008), granted summary judgment for the railroad. In fact, the court denied summary judgment for the plaintiff. It was in that context that

Respondent does not take issue with any of this. He does not deny that both of the questions presented in the petition have divided the lower courts or that one of them has divided this Court. He does not dispute that the questions arise in thousands of cases each year or that the differing standards routinely affect outcomes. And he offers no defense of the "relaxed" standards on the merits.

The sole contention in respondent's brief in opposition is that the Court should deny review because petitioner did not challenge the "relaxed" standards in the court of appeals. Br. in Opp. 2-8. That contention overlooks the fact that the court of appeals *actually decided* the issues raised in the petition. As explained below, that is sufficient to place the issues before this Court.

2. Respondent asserts that "an issue will not be addressed for the first time by the United States Supreme Court where it has not been properly advanced and preserved before the lower courts." Br. in Opp. 7-8. That is simply incorrect.

This Court's "traditional rule * * * precludes a grant of certiorari only when 'the question presented was not pressed *or* passed upon below.'" *United*

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the court held, as the petition indicates, that the plaintiff was required to, but could not, establish proximate causation. The Ohio trial court's decision stands in stark contrast to a decision issued just last week in which a federal district court found similar evidence sufficient to support a verdict in the FELA plaintiff's favor under a relaxed "but for" causation standard. See *Magelky* v. *BNSF Ry. Co.*, ___ F. Supp. 2d ___, 2008 WL 4416754, at *3-*4 (D.N.D. Oct. 1, 2008) ("Evidence was presented during trial that a broken coupler caused the train to stop, that Magelky disembarked the train to investigate the problem, and that during the investigation she was injured.").

States v. *Williams*, 504 U.S. 36, 41 (1992) (quoting *id.* at 58 (Stevens, J., dissenting)) (emphasis added). The rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.* The Court has "never adhered" to a rule "limiting review to questions pressed by the litigants below." *Id.* at 42 n.2. On the contrary, it has repeatedly rejected that rule, finding in numerous cases that an issue not *pressed* below was properly before the Court because it had been *passed upon* below.[2] The authorities on which respondent relies (Br. in Opp. 8) are all cases in which the issue was neither pressed *nor* passed upon.[3] The Court's rule makes particular sense

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[2] See *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991) (declining to dismiss petition as improvidently granted because, although "petitioner did not * * * present the merits of the * * * issue to the Court of Appeals, * * * the Court of Appeals * * * decided the * * * issue"); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. * * * It suffices * * * that the court below passed on the issue * * *."); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1994) (per curiam) ("[In *Williams*] we applied [the] rule * * * which precludes our review of an issue that 'was not pressed or passed upon below.' Because the issue there had been passed upon by the lower court, we reviewed it.") (quoting *Williams*, 504 U.S. at 41) (citations and emphasis omitted); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below.") (emphasis omitted); *Verizon Commc'ms Inc.* v. *FCC*, 535 U.S. 467, 530-531 (2002) (rejecting "claim of waiver" because "[t]he Court of Appeals passed on [the] issue").

[3] See *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 776 (2007) (lower courts "gave no consideration" to the issue and respondents "raised the issue for the first time before this Court"); *Travelers Cas. & Surety Co. of Am.* v. *Pac. Gas & Elec. Co.*, 127

when, as here, the law in the relevant circuit is clear—"relaxed" FELA standards are firmly established by a line of Second Circuit decisions stretching back nearly a decade and a half (see Pet. 9 & n.2)—and urging a different position would be pointless because a panel has no power to overrule decisions of prior panels (see, *e.g.*, *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 116, 122 (2d Cir. 2007)).

The questions presented in the petition are thus properly before this Court because they were passed upon by the court of appeals. The court below explicitly held that FELA "creat[es] a relaxed standard for negligence as well as causation" and that, "[m]easured by these standards," the evidence was sufficient to support a verdict in respondent's favor. Pet. App. 3a (quoting *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999)).

Respondent nevertheless asserts that "[t]here is nothing in the Opinion [of the court of appeals] which discusses the validity or propriety of [the re-

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S. Ct. 1199, 1207 (2007) ("we ordinarily do not consider claims that were neither raised nor addressed below"); *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1407 (2008) ("none of [this] has been considered previously in this litigation" and petitioner merely "suggested something along these lines in the Court of Appeals"). The remaining decision on which respondent relies, *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008), states only that the petitioners did not raise the issue "in their briefs before the Second Circuit." *Id.* at 1011. But there is no indication that the court of appeals actually decided the issue either. See *id.* at 1006, 1011; *Riegel* v. *Medtronic, Inc.*, 451 F.3d 104 (2d Cir. 2006), aff'd, 128 S. Ct. 999 (2008). In any event, in *Riegel*, unlike in this case, the petitioners also failed to "raise th[e] argument in their petition for certiorari." 128 S. Ct. at 1011. That provided an independent ground for declining to decide the issue. See Sup. Ct. R. 14.1(a).

laxed] standards." Br. in Opp. 5. That is simply not true. By holding that FELA "creat[es] a relaxed standard for negligence as well as causation" (Pet. App. 3a), the Second Circuit necessarily decided that the relaxed standards are both "valid[]" and "prop[er]," as it has repeatedly done in prior cases (see Pet. 9 & n.2).

This Court has made clear, not only that it may address an issue that was passed upon below, even if it was not pressed, but that there is particular reason to do so when the issue is "one of importance to the administration of federal law," *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991), and "one placed in a state of flux by [a] split" between the decision below and other cases, *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (citation omitted). That is manifestly the case here.

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 08-269

IN THE

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CSX TRANSPORTATION, INC.,
Petitioner,

v.

RICHARD RIVENBURGH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 08-269

CSX TRANSPORTATION, INC.,
Petitioner,

v.

RICHARD RIVENBURGH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] In accordance with Rule 37.2(a), AAR has provided notice to Respondent's counsel of AAR's intent to file a brief. Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and

[1] The letter expressing consent has been filed with the Clerk of the Court.

Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

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[2] *E.g., Norfolk Southern Ry. Co. v. Sorrell*, 547 U.S. 1127 (2006); *Illinois Cent. R.R. v. Smallwood*, 544 U.S. 992 (2005); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

In this case, the court below erroneously held that a "relaxed" standard of causation and negligence applies in FELA cases. This ruling echoes prior decisions of the Second Circuit and some other lower courts, but is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts. Confusion over the proper standard of causation and negligence, issues that can affect the outcome of virtually every FELA lawsuit, has existed for decades in the lower courts. Therefore, AAR members, who make up the vast majority of FELA defendants, have a strong interest in seeking definitive guidance on these issues from this Court.

When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal

law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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October 2, 2008

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IN THE

Supreme Court of the United States

No. 08-269

CSX TRANSPORTATION, INC.,
Petitioner,

v.

RICHARD RIVENBURGH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The interest of *Amicus curiae* Association of American Railroads (AAR) is set forth in the Motion for Leave to File A Brief which is filed along with this brief.

SUMMARY OF THE ARGUMENT

This Court should grant certiorari in order to provide guidance on two fundamental issues arising under the Federal Employers' Liability Act (FELA), 45

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

U.S.C. §§51-60, that have been the source of confusion and lack of uniformity for many years: the proper standards of causation and negligence. The way courts interpret these concepts has a significant impact on the outcome of numerous FELA cases. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, lower courts have held that more "relaxed" burdens apply to plaintiffs in proving causation and negligence in FELA cases than would in an ordinary common law action. Only review by this Court, and establishment of the proper standards of causation and negligence, will end this intolerable lack of uniformity on these fundamental issues.

A reading of the language of the statute, the legislative history and early decisions of this Court shows that Congress did not intend to modify the common law standards of negligence and causation when it enacted FELA in 1908. Congress did expressly modify some of the prevailing common law defenses that made recovery more difficult, but this statutory modification of common law did not include any alteration of the standards of negligence and causation. This Court has held repeatedly that modifications to the common law are limited to those areas that Congress expressly addressed, and has reiterated on multiple occasions that proximate cause and ordinary negligence are the concepts that apply under FELA. There is simply no support for the lower court decision that hold otherwise.

The decision below, and similar decisions, have transformed FELA in a hybrid compensation law. The causation and negligence standards have been relaxed to the point of making FELA close to a no-fault statute. At the same time, FELA incorporates

the concept of full tort damages. In contrast, the workers' compensation systems that cover virtually all but the railroad industry offer benefits without regard to fault, but limit and cap benefits in order to promote return to employment. The unwarranted modification to FELA that have been engrafted onto the statute by some lower courts is both contrary to Congress's intent and bad public policy.

ARGUMENT

I. THE PROPER STANDARD OF CAUSATION AND NEGLIGENCE ARE FUNDAMENTAL ISSUES ARISING UNDER FELA WHICH CONTINUE TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

"It is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject. *Parker v. Atchison, Topeka & Santa Fe Ry. Co.,* 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). As FELA marks its one hundredth anniversary, this observation of the California Court of Appeals remains an accurate, and lamentable, description of the state of FELA jurisprudence. The time is long due for this Court to address the issue of the proper standard of causation under FELA, a question which it broached, but ultimately did not address, last year in *Norfolk Southern Ry. Co. v. Sorrell*, 127 S. Ct. 799 (2007). As with the standard of causation, the standard of negligence under FELA also is the subject of confusion, and absence of uniformity, in the lower courts. This issue too demands guidance from this Court.

A. Certiorari Should Be Granted Because the Erroneous Interpretation of FELA by the Court Below Has a Real, and Significant, Impact on the Outcome of FELA Cases

As Petitioner explains, a transformation has occurred in FELA jurisprudence over the past fifty years to the point where there is a serious split of authority in the lower courts on the standards of causation and negligence that apply in FELA cases [Petition at 9-15]. Typically, courts erroneously ascribe to this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied,* 353 U.S. 943 (1957), an intent to "relax" the standard of causation under FELA,[2] often utilizing colorful metaphors to describe this alleged statutory metamorphosis. For example, the Seventh Circuit explained that to sustain a jury verdict in a FELA case requires "[e]vidence scarcely more substantial than pigeon bone broth." *Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990); *See e.g., Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004) (Calling the plaintiff's burden of proof "featherweight.")

No statutory changes were made to FELA prior (or, for that matter, subsequent) to *Rogers* that would warrant such a radical departure from the text of FELA, and, in any event, nothing in the *Rogers* opinion supports the interpretation of FELA given by many lower courts, including the Second Circuit in this case. [Petition at 19-21] Nonetheless, the Second

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[2] *E.g., Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2nd Cir. 1999); *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993); *Beeber v. Norfolk Southen Corp.*, 754 F. Supp. 1364, 1372-73 (N.D. Ind. 1990).

Circuit has interpreted *Rogers* as granting a license for even further judicial amendment of FELA, explaining that while "[t]he Supreme Court has not expressly held that a relaxed standard of negligence, as distinguished from causation, applies under FELA [citation omitted] [ ] numerous appellate courts, including ours, have construed the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation." *Uflik v. Metro-North Comm. R.R.*, 77 F.3d 54, 58, n.1 (2nd Cir. 1996). As Petitioner points out, other courts have taken similar liberty, and there continues to be a split among lower courts, not just over the proper standard of causation under FELA, but also over the proper standard of negligence. [Petition at 14-15]

The issues of the proper standards of causation and negligence under FELA are not merely a topic for musings in jurisprudential treatises: they have real world consequences. When a court employs erroneous standards governing the essential elements of a civil action, either in formulating jury instruction or ruling on dispositive motions, it can affect the outcome of the case.

A vivid illustration of this phenomenon is *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985). In this case, the railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Noting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id* at

1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

The case also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court explained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the identical conduct that gave rise to liability in the FELA action, did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA.

Other examples abound. In ruling on a railroad's summary judgment motion, the Court described the plaintiff's case as "weak" and stated that the evidence "cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA

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[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

case." *Kreig v. CSX Transp., Inc.*, No. 3:05CV-456-H (W.D. Ky.)(App., *infra*, 1a-5a). Nevertheless, the Court denied the motion. The court based its ruling on its view that the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case," with its comments strongly suggesting that the outcome would have been different had this not been a FELA action.

In *Davis v. CSX Transp., Inc.*, 2005 WL 1935676 (W.D. Ky. 2005), the Court explained that the "burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." *Id.* at *1. As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a box car sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. Civ. S-01-914 GGH (E.D. Calif. 2002)(App., *infra*, 6a-15a), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and that "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Examining the evidence in the context of these legal conclusions, the court denied the railroad's motion, finding that "the plaintiff has produced sufficient evidence, drawing all inferences in plain-

tiff's favor, and given the weakened causation standard in FELA."

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, where the appellate court interprets FELA's standard of causation and negligence as "relaxed" such rulings typically do not survive appellate review. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 84 (Ky. App. 2006) the trial court granted summary judgment to the railroad, finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." However, the Kentucky Court of Appeals reversed, no doubt influenced by its view that "Congress intended FELA to be a departure from common law principles of liability" and that "FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

This Court's decision in *Sorrell* may have extinguished the notion that a different standard of causation applies to employer negligence than to employee contributory negligence; however, there is no reason to believe that it will impact the thinking of lower courts on the more fundamental issues of the substantive standards of causation and negligence in FELA cases.[4] A few months ago, a federal court in Louisiana summarized the judicial attitude about

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[4] Recently, a federal court in Ohio held that while the proximate cause standard applies when evaluating an employee's motion for summary judgment, a more relaxed standard applies when evaluating an employer's motion. *Jarrett v. CSX Transp., Inc.*, 2008 WL 4239148 (N.D. Ohio 2008). No explanation is given on which section of the statute calls for such a distinction.

FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 2008 WL 3850547 at *3 (E.D. La. 2008). Similarly, a post-*Sorrell* decision of the Fifth Circuit made it clear that the relaxed burden FELA purportedly places on plaintiffs calls for courts to handle FELA cases differently than other common law negligent actions, explaining that "the FELA 'complete absence of probative facts' standard is in sharp contrast to the more demanding test applicable in *other* civil cases." *Howard v. Canadian Nat'l/Illinois Central R.R.*, 233 Fed. Appx. 356, 357 (5th Cir. 2007) (emphasis in the original).[5]

This judicial attitude will continue to impact numerous cases in the future. Several thousand FELA lawsuits are filed each year.[6] Except in the occasional case where the railroad admits liability, negligence and causation are elements of the plaintiff's case in each such lawsuit. The "relaxed" standards of causation and negligence utilized by some courts will continue to make recovery of damages more likely—often virtually assured—in FELA cases, as many courts will continue to see FELA's overarching purpose as

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[5] In a Jones Act case decided last week, the Fifth Circuit noted that "[t]he standard of causation . . . is not demanding." *Johnson v. Cenac Towing, Inc.*, 2008 WL 4330553 (5th Cir. 2008). The Jones Act, which covers maritime employees, incorporates the substantive law of FELA. 46 U.S.C. §30104.

[6] While the number of FELA suits filed each year varies quite a bit, for the past ten years, statistics complied by AAR show that the number of suits filed annually range from about 2,500 to 8,000, with an average of just below 5,000.

promoting recovery. *See Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638 (6th Cir. 1974)("FELA's liberal purpose must be kept in mind when confronting arguments that would restrict an employer's liability under the Act." *Id.* at 641.) However, while many courts may believe that guaranteed recovery for rail employees injured on the job is good public policy, it was not Congress's intent to guarantee recovery in all cases.

B. There Is No Evidence That FELA Was Meant to Incorporate Anything but Common Law Concepts of Negligence and Causation

When FELA was enacted there was little reason to foresee that the concepts of negligence and causation, fundamental elements of the statutory remedy FELA provides, would elude clear definitions so far into the future. Congress enacted FELA in 1908 in response to what was perceived as an intolerably high injury rate in the railroad industry.[7] At this time, the concept of no-fault workers' compensation—today the predominant method of compensating workplace injuries—had not yet gained a foothold in the United States. Therefore, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in

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[7] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, Statistics of Railways in the United States 1908 41, 99 (1909). On several occasions at the end of the previous century, President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliances Act, c. 196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

FELA was straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad.

FELA embraced the concept of common law negligence, while expressly modifying some of the harsher aspects of nineteenth century common law. At the time of FELA's enactment the common law had erected a number of often insurmountable barriers to recovery by workers sustaining job-related injuries.[8] To ameliorate the harsh results which often were a consequence of prevailing legal doctrines, Congress made several specific changes to existing common law. For example, in an effort to promote recovery, the defenses of assumption of the risk and the fellow servant doctrine were eliminated. 45 U.S.C. § 54; *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).[9] Additionally, in what, for the time,

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[8] For example, recovery also was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 28 Minn. 128 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842).

[9] Initially, FELA eliminated the assumption of the risk defense only in cases where the railroad violated a safety statute. In 1939, Congress amended FELA to eliminate the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943).

was a significant innovation in tort law, FELA incorporated the doctrine of comparative fault. The prevailing rule in the United States in the nineteenth century was that contributory negligence by the plaintiff completely barred recovery, even if the defendant also was at fault. *E.g., Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884)("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.") Under FELA, rather than completely barring recovery, if the employee's negligence contributed to the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. §53.[10]

Despite Congress' decision to modify or eliminate some of the prevailing common law defenses, there is no evidence that Congress believed it was modifying the core concept of negligence that underlies the statute. Contemporaneously with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, at 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion whatsoever that the standards of causation or negligence were being modified. The House of Representatives offered an identical list when it described the how FELA "change[d] the common-law liability of employers."

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[10] Contributory negligence is not considered if the injury is caused by violation of a safety statute. 45 U.S.C. §53

H.R Rep. No. 1386, at 1 (1908), noting, in addition, that the FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." *Id.*

Similarly, this Court's understanding of the changes made to common law by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence; (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N. H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). Again, nowhere was it suggested that replacement of the proximate cause standard by a more lenient causation requirement was among FELA's modifications to the common law. Last year, in *Sorrell*, this Court again "catalogued" the ways in which FELA departed from the common law, stating only that FELA "abolished the fellow servant rule; rejected contributory negligence in favor of comparative negligence; prohibited employers from contracting around the Act, and abolished the assumption of the risk defense." 127 S.Ct. at 807.

Indisputably, when Congress enacted FELA it attempted to make recovery more likely than would

have been the case under the prevailing law. However, it is equally indisputable that Congress envisioned that the remedy available under FELA would be consistent with the common law concepts of causation and negligence. That point was consistently recognized by this Court in the decades immediately following FELA's enactment. *See e.g., Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916)(The rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery.") Consistent with that approach, in the years following FELA's enactment, this Court issued a number of decisions confirming that proximate cause is the applicable causation standard under FELA. *See e.g., Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934).

In fact, during the first half of the twentieth century, this Court continued to articulate the traditional common law concepts of negligence and causation as the proper standards under FELA. *E.g., Tennant v. Peoria & Pakin Union Ry. Co.*, 321 U.S. 29, 32 (1944)(The employee has to prove that the railroad's negligence "was the proximate cause in whole or in part of the fatal accident."); *Bailey v. Vermont Cent. R.R.*, 319 U.S. 350, 353 (1943)(FELA "has been largely fashioned from the common law [citation omitted] except as Congress has written into the Act different standards." Negligence is the duty "to use reasonable care."); *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949)(Petitioner was entitled to recover if the "defective equipment was the sole or a contributory proximate cause of the decedent employee's death."); *Urie v. Thompson*, 337 U.S. 163, 182 (1949)(FELA "is founded on common-law con-

cepts of negligence and injury."); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949)(Negligence is "what a reasonable and prudent person would have done under the same circumstances."). Other than its reliance on equally erroneous prior Second Circuit precedent, there simply is no basis for the lower court's conclusion that "FELA defendants may be held liable for injuries that would be considered too remote under common law." [Petition at 17a.]

II. IT IS NOT THE ROLE OF THE COURTS TO INCORPORATE NO-FAULT COMPENSATION PRINCIPLES INTO FELA WHERE CONGRESS DID NOT INTEND TO DO SO; MOREOVER, IT IS BAD PUBLIC POLICY

Perhaps if rail employee compensation legislation had been considered a decade later Congress would have turned to a no-fault compensation law for railroad workers. Shortly after FELA was enacted, individual states began to adopt no-fault workers' compensation laws as the means of compensating workplace injuries. Most states enacted workers' compensation laws of general application between 1910 and 1920; by 1930 all but four states had enacted a workers' compensation law.[11] In 1916, Congress enacted a no-fault compensation statute for employees of the federal government, Federal Employees Compensation Act, 5 U.S.C. §8101 *et seq.*, and in 1927 Congress enacted a no-fault compensation statute to cover workplace injuries for harbor workers. Longshore

[11] In 1948, Mississippi became the last state to adopt a workers' compensation law. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998).

and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. However, for railroad workers, Congress enacted, and has maintained in place, a tort system.

Nonetheless, through the decision below, and numerous similar rulings, many lower courts are incorporating no-fault concepts into FELA[12] This is contrary to Congress' intent. Moreover, given FELA's incorporation of tort damages principles, it is misguided and unsound public policy.

Tort law and compensation law approach questions of liability from fundamentally different perspectives. Under workers' compensation, "unlike tort, the right to benefits and amount of benefits, are largely based on a social theory of providing support and preventing destitution, rather than settling accounts between the individuals according to their personal deserts or blame." A. LARSON & K. LARSON, LARSON'S WORKERS' COMPENSATION LAW §1.02 (2004 ed.) The right to compensation is conditioned on whether

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[12] Interestingly, in a number of cases decided in the middle of the last century, around the time when workers' compensation became established as the prevailing means of addressing workplace injuries, some of the Justices of this Court questioned whether a tort system was appropriate for addressing workplace injuries in the railroad industry. *See Bailey supra*, 319 U.S. at 354; *Wilkerson supra*, 336 U.S. at 65 (Frankfurter, J. concurring). At the same time, it was recognized that regardless of the answer to that question, the Court had no authority to incorporate no-fault concepts into FELA. "I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence." *Bailey*, 319 U.S. at 358 (opinion of Justice Roberts). "It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be." *Wilkerson* 336 U.S. at 66 (Frankfurter, J., concurring).

there was "a work-connected injury. Negligence, and for the most part, fault, are not in issue and cannot affect the result." *Id.* at §1.03[1]. Moreover, under workers' compensation, "unlike in tort, the only injuries compensated are those which actually or presumptively produce disability and thereby presumably affect earning power." *Id.* at §1.03[4].

Workers' compensation embodies a significant tradeoff: the right of the employee to seek a full recovery is removed in exchange for the certainty of more limited benefits regardless of fault. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 9 (1998). This is one of the "fundamental points of cleavage between compensation and tort." LARSON at §1.03[4]. Under workers' compensation, "[t]he amount of compensation for disability depends on the worker's previous earning level, for most acts award a percentage of average wage, somewhere between a half and two-thirds. But practically all acts also set a maximum in terms of dollars per week." LARSON at §1.03[5]. "It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." *Id.*

The primary objective of workers' compensation is to sustain the injured employee through his or her period of disability and to promote rehabilitation and return to gainful employment. One reason workers' compensation systems establish limits on wage loss benefits is the widely accepted view that if compensation matches, exceeds, or even approaches, the em-

ployee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly.[13]

Though FELA serves in place of a workers' compensation act for the railroad industry, liability is not bounded by the caps and limitations that typically characterize workers' compensation laws. In FELA cases, juries typically are given wide discretion to make determinations of fact, including questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952)("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason."); *Seaboard Coast Line R.R. v. Gillis*, 321 So.2d 202, 208 (Ala. 1975) ("[T]he extent of damages under FELA is peculiarly a fact question for the jury."). Thus, seven figure FELA awards are not uncommon, *e.g.*, *DeBiasio v. Illinois Central R.R.*, 52 F.3d 678 (7th Cir. 1995)($4.2 million award affirmed); *Frazier v. Norfolk & Western Ry. Co.*, 996 F.2d 922 (7th Cir. 1993)($2.3 million award not excessive), and a verdict will be deemed excessive only if it "shock[s the] judicial conscience." *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993)

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[13] Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995); Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No.4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits. . . . higher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

($1.75 million verdict, including over $1 million in intangible damages, not excessive).

The right to uncapped damages in tort is offset by the fact that damages can be recovered only if the defendant's fault is proved. "Theoretically, the most conspicuous difference between FELA remedies and compensation is that, under FELA, those workers who happen to be able to prove negligence obtain large verdicts at the expense, so to speak, of all other injured workers, who receive nothing, while under compensation laws everyone gets limited but assured cash payments and medical care." LARSON at §147.07[6]. However, as a result of judicial construction of FELA, "when the worker does assert his or her FELA rights, the actual basis for recovery is much closer to a nonfault type of liability and further from an old-fashioned negligence liability than the printed page of the statute book may lead one to believe." *Id.* at §147.07[7]. "Unless a significant percentage of comparative negligence can be proven, the FELA operates much like a no-fault law but with full tort damages available." LENCSIS at 24.

Incorporating the workers' compensation concept of liability without fault into FELA undermines the goals of both systems. The ability to collect full tort damages without the need properly to demonstrate fault neither acts as a deterrent to wrongful conduct nor effectively promotes prompt return to the job. Given the realities of litigation, FELA plaintiffs often will attempt to maximize their recovery by declining to return to the job or undergo rehabilitation, asserting in the FELA suit that they are permanently disabled from working. After disposition of the litigation and collection of an award, the same worker may

seek to return to employment with the railroad, claiming he has recovered.[14]

* * *

In recent years, this Court has properly resisted entreaties to allow FELA's "remedial and humanitarian" purposes[15] to trump the language of the statute and Congress's intent. *Sorrell*, 127 S.Ct. at 808. ("It does not follow . . . that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees.")[16] However, taking a different

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[14] Typically, these efforts are foreclosed by judicial estoppel. *See Lewandowski v. Nat'l R.R. Pass. Corp.*, 882 F.2d 815 (3rd Cir. 1989); *Morawa v. Consolidated Rail Corp.*, 819 F.2d 289 (6th Cir. 1987); *Jones v. Cent. of Georgia Ry. Co.*, 331 F.2d 649 (5th Cir. 1964); *Scarano v.Cent. R.R. of New Jersey*, 203 F.2d 510 (3rd Cir. 1953).

[15] *See e.g., Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 580 (6th Cir. 2000)("FELA is 'a remedial and humanitarian statute.'")

[16] In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court rejected the Third Circuit's decision to disregard common law limitations on recovery for negligent infliction of emotional distress in order to promote FELA's preference for a liberal recovery. Instead, the Court held that FELA required application of the common law zone of danger test, a test which ultimately resulted in both plaintiffs' claims being rejected. In *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997), consistent with the policy considerations underlying the common law limitations on emotional distress claims, this Court denied recovery for negligent infliction of emotional distress to an asymptomatic plaintiff who was exposed to asbestos, rejecting plaintiff's argument that the "'humanitarian' nature of the FELA warrants" recovery. 521 U.S. at 438. Earlier, in *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988), this Court rejected the argument that to foster FELA's humanitarian purposes, prejudgment interest be permitted even though it was not available at common law when FELA was enacted.

path, the Second Circuit and many other lower courts have transformed FELA into a compensation hybrid—unlike any system in the nation—with a liability standard approaching "no-fault," but with full tort damages available to plaintiffs. This would be acceptable if, in fact, it was the course chosen by Congress. But it is not. This Court should grant certiorari to provide lower courts with much need guidance on the proper standards of negligence and causation—fundamental concepts that can have a profound effect on the outcome of virtually every FELA case.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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October 2, 2008

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:05CV-456-H

ROBERT A. KRIEG

Plaintiff,

v.

CSX TRANSPORTATION, INC.

Defendant.

MEMORANDUM OPINION AND ORDER

This is a claim brought under the Federal Employers Liability Act ("FELA"), which makes railroads liable to any employee for injuries where its negligence played any part, even the slightest, in producing that injury. Here, Plaintiff alleges a neck injury caused by a "rough coupling." Defendant has moved for summary judgment on the grounds that events in question were regular occurrences and that Plaintiff has no proof of negligence.

I.

On April 16, 2001, Plaintiff was hired by CSXT as a switchman. Plaintiff completed his CSXT training August 1, 2001, and began work. He was furloughed August 25, 2001, for seven months, and returned to CSXT approximately early March 2002, again as a switchman. He worked as a switchman on the

extraboard for approximately four months, and was moved into Remote Control Operation ("RCO") training.

When working an RCO job, the employee wears a locomotive control unit, identified as a LCU or OCU, operating control unit. An employee working an RCO job out of the Osborn Yard in Louisville is teamed with another RCO operator, who also wears an OCU, and potentially is also capable of operating the train with his OCU, The OCU is a green box that the employee wears on a vest, weighing about 2 1/2 pounds. It consists of a computer that controls the engine's movements (back and forth), speed, brakes, horn, bell and head lights.

On August 14, 2002, Plaintiff claims he was injured as a result of a "rough coupling" while working onboard engine 6022. His co-worker, David Lantz was on the ground controlling the movement. At the time of the accident Plaintiff as Operator B positioned in the engineer seat on the right side of the unit behind the control stand. Lantz was on the ground, controlling the movement of 6022 with his OCU. Lantz testified that he made his safely stop; began to rev the unit by moving the throttle on the control box; made sure the draw bars were lined up and placed the controls at the "couple" setting. The locomotive began to build up, he heard the engine's brakes release and then he remembered locomotive 6022 lunged forward in the coupling move.

Lantz testified that as Operator A, he had no control over the lunge movement and no advance warning of it. The locomotive was moving on its own, and then spurted forward resulting in a rough coupling. Plaintiff testified that the locomotive 6022 lunged forward into the box car and he felt

immediate pain in his neck. He reported the injury a short time later to Trainmaster Fred Sierota and Terminal Superintendent John Bradley.

Plaintiff testified that he personally had experienced operating problems with CSXT 6022 prior to August 14, 2002, including prior instances of the locomotive "surging," and other instances whereby 6022 would lose communication with the OCU, thereby throwing the unit into emergency. Lantz testified that this incident was similar to other rough coupling incidents that occurred fairly routinely.

On August 11, 2005 Plaintiff filed a two-count complaint against CSXT. Court I is based upon the Federal Employers Liability Act, and Count II is based upon a violation of the Locomotive Inspection Act.

II.

Under FELA, [e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. FELA provides broad remedial measures for railroad employees. *Lisek v. Norfolk and Western Railway Company,* 30 F.3d 823, 831 (7th Cir. 1994). In a FELA action, the railroad will be held liable if the employer's "negligence played any part, even the slightest, in producing the injury." *Id* at 832 (internal quotations and citations omitted). Plaintiff's burden is significantly lighter than in an ordinary negligence case. *Id*

FELA is a general negligence statute and as such, it neither prohibits nor requires specific conduct by a railroad. *Waymire v. Norfolk and Western Railway*

Company, 218 F.3d 773, 775 (7th Cir. 2000). LIA imposes absolute duties to provide safe equipment. *DeBiasio v. Illinois Central Railroad,* 52 F.3d 678, 683 (7th Cir. 1995); *Richardson v. Consolidated Rail Corp.,* 17 F.3d 213, 216 (7th Cir. 1994) (BIA, also known as LIA). LIA does not create private rights of action, but employees alleging injury resulting from a violation of the LIA may sue under FELA. *Crane v. Cedar Rapids & Iowa Railway Company,* 395 U.S. 164, 166 (1969). Thus, an employee may recover under FELA for injuries resulting in whole or in part from a railroad carrier's negligence or from its violation of the LIA. *O'Donnell v. Elgin, Joliet and Eastern Railway Co.,* 338 U.S. 384, 391 (1949); *Crane,* 395 U.S. at 166.

Plaintiff's particular claim is based upon the theory that locomotive 6022 was not operating in a proper or safe condition, nor functioning in a "normal, natural and usual manner." These circumstances violate the LIA. *See* 49 U.S.C. § 20701; *Meyers v. Reading Company,* 331 U.S. 477, 483 (1947). Plaintiff argues that the improper or unsafe condition was that the 6022 had a tendency to "lunge" or "surge" at the moment of coupling. This appears to be a weak case, even by FELA's standards. Some of the testimony supports that similar "rough couplings" are not an unusual occurrence. Moreover, it is unclear whether such a low speed lunge or surge is actually unsafe. The nature of the incident itself appears mild. No other evidence suggests other injuries from similar incidents. The testimony of the two key witnesses seems to differ on some key interpretation of events. These factors cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA case.

Nevertheless, some of the evidence does suggest that locomotive 6022 was prone to such surges to a greater extent than others. Moreover, Plaintiff claims to have warned Defendant about the tendency to lunge or surge. Should the jury believe this testimony, it would not be unreasonable to conclude that the locomotive was unsafe. A jury could also believe that Defendant was on notice, of the unsafe condition and was negligent in failing to attend to it. These inferences would be sufficient for the claim to survive summary judgment under FELA.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment is DENIED.

The Court will set a conference in the near future to assign a trial date.

[SEAL]

/s/ John G. Heyburn II
John G. Heyburn II
Chief Judge, U.S. District Court

September 25, 2006

cc: Counsel of Record

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-01-914 GGH

JOSEPH W. KOLLER,
Plaintiff,

vs.

BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY,
Defendant.

ORDER

Hearing on defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56, was held on April 25, 2002.[1]

BACKGROUND

Plaintiff, a railroad brakeman, was injured on July 23, 1998. While working in the Gateley area near Pinole/Richmond, he was attacked by two teenagers with a two by four. His neck and shoulder were injured. He brings this action against his defendant employer, the "railroad," pursuant to 45 U.S.C. § 56, *et. seq.*, the Federal Employees Liability Act ("FELA"), for its allegedly negligent failure to prevent a third party attack.

The railroad has moved for summary judgment on three grounds. The railroad asserts plaintiff has

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[1] The case is before the undersigned pursuant to 28 U.S.C § 636(c) (consent to proceed before a magistrate judge).

failed to adduce disputed facts sufficient to establish: a) that plaintiff's injury was reasonably foreseeable; b) that the railroad breached its duty to provide adequate security; or c) that the railroad's conduct was the cause of plaintiff's injuries. Because a FELA plaintiff need produce only slight or minimal facts to support a jury finding of negligence, and plaintiff has met that standard, defendant's motion is DENIED. *See Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 83 S.Ct. 659 (1963) (railroad chargeable with notice of a dangerous insect bred in a stagnant pool of water on the railroad's right-of-way).

SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment avoids unnecessary trials in cases with no disputed material facts. *See Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). At issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986). Two steps are necessary. First, according to the substantive law, the court must determine what facts are material. Second, in light of the appropriate standard of proof, the court must determine whether material factual disputes require resolution at trial. *See id.* at 248, 106 S. Ct. 2510.

When the opposing party has the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. *See e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885, 110 S. Ct. 3177, 3187 (1990), When the opposing party has the burden of proof, the moving

party need only point to matters which demonstrate the absence of a genuine material factual issue. *See Celotex v. Cattret*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

If the moving party meets its burden, the burden shifts to the opposing party to establish genuine material factual issues. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S, 574, 586, 106 S. Ct. 1348, 1356 (1986).[2] The opposing party must demonstrate that disputed facts are material, *i.e.*, facts that might affect the outcome of the suit under the governing law, *see Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that disputes are genuine, *i.e.*, the parties' differing versions of the truth require resolution at trial, *see T.W. Elec.*, 809 F.2d at 631. The opposing party may not rest upon the pleadings' mere allegations or denials, but must present *evidence* of specific disputed facts. *See Anderson*, 477 U.S. at 248, 106 S. Ct. 2510.[3] Conclusory statements cannot defeat a properly supported summary judgment motion. *See Scott v. Rosenberg*, 702 F.2d 1263, 1271-72 (9th Cir. 1983).

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[2] The nonmoving party with the burden of proof "must establish each element of his claim with significant probative evidence tending to support the complaint." *Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir. 1994) (internal quotations omitted). A complete failure of proof on an essential element of the nonmoving party's case renders all other facts immaterial, and entitles the moving party to summary judgment. *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

[3] A verified complaint may be used as an affidavit in opposition to the motion. *Schroeder v McDonald*, 55 F. 3d 454, 460 (9th Cir. 1995); *McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987) (per curiam).

The court does not determine witness credibility. It believes the opposing party's evidence, and draws inferences most favorably for the opposing party. *See Anderson* at 249, 255, 106 S. Ct. at 2510-11, 1513. Inferences, however, are not drawn out of "thin air," and the proponent must adduce evidence of a factual predicate from which to draw inferences. *American Int'l Group, Inc. v. American Int'l Bank*, 926 F.2d 829, 836 (9th Cir.1991) (Kozinski, J., dissenting) (citing *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552).

If reasonable minds could differ on material facts at issue, summary judgment is inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On the other hand, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587, 106 S. Ct. 1356 (citation omitted). In that case, the court should grant summary judgment.

"[A]lthough railroad companies do not insure against accidents and the plaintiff in FELA cases still bears the burden of proving negligence, courts have held that only 'slight' or 'minimal' evidence is needed to raise a jury question of negligence under FELA." *Mendoza v. Southern Pac. Transp. Co.*, 733 F.2d 631, 632 (9th Cir.1984) (internal citations omitted). "A jury's right to pass upon the questions of fault and causation in FELA actions must be viewed liberally; the jury's power to engage in inferences is significantly broader than in common law negligence actions." *Pierce v. Southern Pacific Transp, Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987) (citing *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147, 149 (8th Cir.1982)).

APPLICATION

A. Forseeability

Urging that judgment should be granted to defendant because plaintiffs claims were not "foreseeable," does not adequately categorize those elements of tort law which are generally reserved to the court or to the jury. "Foreseeability" is a concept that spreads itself throughout those elements. The law sometimes draws a line for actionable and non-actionable injuries on the basis that a lack of foreseeability precludes a duty being found. *See Thing v. La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865 (no duty to anticipate that mother not present at the accident site of her child would suffer emotional distress when she arrived at the scene). Foreseeability there simply means that policy considerations permit or preclude stretching liability to cover a general situation. As tort law has evolved, and duty questions have been hashed out for the most part, the question of foreseeability is more often a fact bound part of the causation analysis—was it "foreseeable that certain actions would result in a particular injury." *See Isaacs v. Huntington Memorail Hospital*, 38 Cal. 3d 112, 131 (n.8), 211 Cal. Rptr. 356 (1985); but *see Saelzler v. Advanced Group*, 25 Cal. 4th 763, 777-78, 107 Cal. Rptr. 2d 617, 627-28 (2001) (distancing itself from *Isaccs* on the connection between foreseeability and causation). Finally, when foreseeability of a risk is at issue, and the law presumes a duty in the general situation, the real issue generally is not whether a duty exists, but whether an admitted duty was breached, *i.e.*, whether defendant acted reasonably. *Marois v. Royal Investigation and Patrol*, 162 Cal. App. 3d 196, 198 (n.2), 208 Cal. Rptr. 384,

387 (1984)[4] Of course, when the risk is perceived, yet injury occurred, the question for the jury centers about the precise actions taken by defendant designed to protect against such injury. Defendant's first thrust herein—that it had no notice that plaintiff's place of injury required security designed to prevent serious injuries inflicted by third parties is directed at the breach of a duty.

"Under the theory of direct negligence, an employer is liable if it fails to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct." *Mullahon v. Union Pac. RR.*, 64 F.3d 1358, 1362 (9th Cir, 1995) (quoting *Taylor v. Burlington Northern R.R.*, 787 F.2d 1309, 1314-15 (9th Cir.1986)). The duty under FELA to provide a safe workplace is non-delegable. *Burlington Northern R. Co. v. Farmers Union Oil Co. of Rolla*, 207 F.3d 526, 532 (8th Cir. 2000). Thus, the existence of defendant's duty is without question.

Turning to whether defendant had sufficient notice to warrant placement of security (a foreseeability of risk breach issue), plaintiff has produced evidence from which a conclusion could be drawn that the area in which plaintiff was injured was unsafe. Employee Robert Varao testified that in 1998 there were trespassers, homeless people, kids and people drinking under the Gateley overpass– "it's just a bad area, a dirty area." (Varao Depn at 8-9). Varao believed the underpass was unsafe, and had been frightened in the area. Engineer Matthew Fike had had rocks thrown at him as well as liquor bottles. He had reported incidents of rock throwing, beer bottle throw-

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[4] However, at times, foreseeability of the risk is determined under a "scope of the duty" rubric. *Ann M. v. Pacific Plaza Shopping Ctr.*, 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137 (1993)

ing and vandalism. He personally had spoken with a railroad security officer about problems at the overpass, and had reported trespassers, homeless encampments, and rock throwing there. A retired railroad police captain, Kevin Lynch, and Frank Saunders, proffered by plaintiff as a police expert, both testified that the attack on plaintiff was foreseeable, given the conditions at the overpass. While the railroad disputes these facts, plaintiff has adduced sufficient evidence to survive summary judgment on the question of "foreseeability."

B. Adequate Security

The railroad argues summary judgment should be granted because the railroad took adequate security steps, including patrolling, prosecuting trespassers, meeting with local law enforcement officials, and instructing crews to report suspicious activity. Here, the railroad assumes that it had sufficient notice of the potential security problems at the injury site, but asks the court to find as matter of law that it acted reasonably in providing adequate security. Whether the railroad took reasonable care to protect its employees in light of the known hazards at Gateley, however, is a question more properly decided by a jury. In contrast to the railroad's arguments, plaintiff has proffered witnesses who opined that the railroad security was inadequate in several respects, including reducing its security force, assigning one officer to patrol 70 miles of track in an unmarked vehicle, failing to fence off an area known to be a gathering spot for criminals, and to remove graffiti, mattresses, and garbage.

C. Causation

In a FELA case, the causation standard is relaxed. *See Smith v. National Railroad Passenger Corp.*, 856

F.2d 467 (2d Cir. 1988). "We have liberally construed [the] F.E.L.A. to further Congress' remedial goal." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542, 114 S Ct. 2396, 2404 (1994) (citing as an example the relaxed standard of causation applied in *Rogers v Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443 (1957)).

Defendant contends that plaintiff has not established a nexus between the claimed lack of security vis-a-vis plaintiff's injury, and that the area in any event was also patrolled by the local police department, the sheriff's department, and the California Highway Patrol. Citing *Thomas v. Consolidated Rail Corporation*, 971 F. Supp. 620, 621 (D. Mass. 1997), defendant concludes that plaintiff cannot show that a lack of railroad security caused the third party trespass at issue here—yet another aspect of "foreseeability." In other words, the railroad insists that even assuming a duty to provide security, and even assuming a breach of that duty in the abstract, lack of security could not have been a cause for plaintiff's injury because no amount of additional (reasonable) security would have prevented the injury, or, in the alternative, that security existed (in reasonable measure) from other sources.

Plaintiff contends security of any type was not adequate and has proffered evidence that security had seldom, if ever, been observed in the area. The record is conflicting concerning the existence of non-railroad security at this point. The nature and extent of the security force patrolling the area, and its effectiveness, are disputed factual questions for resolution by a jury. Plaintiff need not show that the lack of security was the sole cause of the trespass which led to the criminal conduct. Plaintiff need only show that

defendant's negligence, even if slight, was one of the causes of plaintiff's injuries.

However, plaintiff should not find from this order that he is completely out of the causation woods. In cases with similar allegations, albeit general tort cases utilizing "a substantia factor" causation standard, courts have found lack of established causation because the plaintiff did not provide "by non-speculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures." *Saelzler*, 25 Cal. 4th at 774, 107 Cal. Rptr. 2d at 625 relying on *Thai v. Stang*, 214 Cal. App. 3d 1264, 1276, 263 Cal. Rptr. 202 (1989) (characterizing as "pure speculation" expert testimony that absence of added security contributed to criminal assault). Indeed, in *Nola M. v. University of California*, 16 Cal. App. 4th 421, 20 Cal. Rptr. 2d 97 (1993), a plaintiff's judgment was reversed because she did not show a connection between an asserted need for increase in security and her specific injury (a rape). The court merely finds at this juncture that plaintiff has produced sufficient evidence, drawing all inferences in plaintiff's favor, and given the weakened causation standard in FELA cases, to go forward on his theory of causation. The court will not hesitate to award judgment pursuant to Fed. R. Civ. P. 50 if the *trial* evidence does not establish *some* non-speculative link, however small, between the security measures allegedly not taken and plaintiff's injury, or if the *trial* evidence demonstrates that the absent railroad security measures argued by plaintiff were in fact being provided in substantial measure by another entity.

CONCLUSION

Disputed issues of material fact preclude entry of summary judgment in this FELA case, Accordingly, IT IS ORDERED that defendant's motion for summary judgment is DENIED.

DATED MAY 8, 2002 /s/Gregory G. Hollows
Gregory G. Hollows
U.S. Magistrate Judge